An Exact and Faithful

RELATION

OF THE

PROCESS

Pursued by Dame *Margaret Areskine*, Lady *Castlehaven*, Relict of the Deceased Sir *James Foulis* of *Collingtoun*; against Sir *James Foulis* now of *Collingtoun*; before the Lords of Council and Session.

WITH CERTAIN

REMARKS

Upon the Import and Extent of

PROTESTATIONS

For Remeed of LAW in General:

And in Particular upon the *Protestation* or *Appeal* offered by the LADY.

EDINBURGH,

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Ame *Margaret Areskine* Lady *Castlehaven.* having succumbed in a Process pursued at her Instance, against Sir *James Foulis* of *Collingtoun*: She did Appeal and Protest for Remeed of Law, against the Interloquitor of the *Lords of Session*: And in prosecution thereof, hath caused Print and publish a Petition to be presented by her to the *High Court of Parliament*: In which she doth not offer any distinct Relation of the Process, Debate, or Decision; but satisfies her self with general groundless Assertions of the Justice of her Cause, and of the Iniquity of the Decision; whereby she pretends, *All Faith in Contracts is Violated, the Law which ought to protect Widows, wrested to their Ruine: And fraud, and indirect Dealings, are not only encouraged, but own'd to be the design of Law*: And which Decision, as it is pretended, *Doth impugne Law, Equity, Justice, and Honesty.*

The *Lady* hath not thought fit to disperse or publish any part of the Process, or Debate upon which the Interloquitor proceeded, For verifying of this great Charge against the *Supreme Ordinary Court of Justice* in the Nation, whom our Predecessors thought worthy to be the Depositars of the Securities of their own, and our, Properties and Possessions; but she is pleased to lay the weight of all upon her own Assertion: And albeit bold Calumnies do oft-times leave some Impression; yet this being a matter of the highest Concern, to the Interest and quiet of all, (not only those who have Process depending, but such as may have them) It cannot be unacceptable, that *Collingtoun* should publish to the World the whole Process and Debate upon which the Interloquitor of the Lords of Session proceeded; which indeed had been the proper part of the *Lady*, who makes the Complaint: By which means, either the *Lady*'s Charge will be made good, or otherwayes the Justice of *Collingtoun*'s Defences, and the Integrity of the Lords will be Vindicate, and the Nation satisfied and quieted in the Evidence, that their Rights and Securities are safely lodged: And it is left to the Judgement of all unbyassed persons, whether the former, or latter doth appear, upon perusal and consideration of the Process, which followeth, with so great Candor and Favour to the *Lady*, that no part of her Claim, or any Evidence thereof produced is omitted; though several Decreets and Instructions produced for *Collingtoun* be forborn; least the Process might thereby appear too prolix.

Copy *of the* Lady's *Contract of* Marriage.

AT *Edinburgh* the first day of *June* one thousand six hundred and sixty one years: It is Appointed, Agreed, Contracted and Ended, betwixt the Honourable Parties following, to wit, *Sir* James Foulis *of* Collingtoun *Knight*, *one of the Senators of the Colledge of Justice*, on the one part: And *Dame* Margaret Areskine, *Relict of Umwhile Sir* Joh. M^c^kenzie *of* Tarbat, on the other part; in Manner, Form, and Effect

fect following: That is to ſay, the foreſaids Parties Binds and Obliges them to Solemnizat and Accompliſh the Holy Band of Marriage each of them with the other in face of Holy Kirk, with all Solemnities requiſite; betwixt the date hereof, and the day of next to come but longer delay. *In Contemplation* of the which Marriage, the ſaid Sir *James Foulis* Binds and Obliges him, to Renounce, Quite-claim and Over-give: Likeas, he by thir Preſents, Renounces, Quite-claims and Over-gives, all Right, Tittle and Intereſt, which he *jure mariti* can have claim or pretend, in and to the ſaid Dame *Margaret* her Conjunct-Fee, and Liferent-Lands, Teynds, and others belonging to her, wherever the ſamen lye within this Kingdom, declaring the generality of this preſent Renounciation to be as ſufficient, as if the ſaid haill Conjunct-Fee, or Liferent-Lands, Teynds, and others were inſert and ſet down here intill: Renouncing all Benefit of the Law, or other Benefit whatſoever, either competent, or that may accreſs to him by this Contract, or by the ſubſequent Marriage, or by any manner of way whatſoever, to her ſaids Conjunct-Fee, or Liferent-Lands, or any part thereof, for now and ever; in Favours of her ſelf to be uſed and diſpoſed of at her pleaſure. And by thir Preſents, doth take his hazard of what he may have otherwayes by the ſaid Dame *Margaret*. *And farder, The ſaid Sir* James Foulis *by thir Preſents, Binds and Obliges him, his Heirs, Executors and Succeſſors, That in caſe it ſhall happen him at any time, during the Marriage betwixt him and the ſaid Dame* Margaret, *to Conqueſce and* Acquire *any ſums of* Money, Lands, *or Heretages, or to* Receive *payment of Sums of Money due to him, in that caſe to Imploy the ſamen,* And *take the* Rights *and Securities thereof in* Favours *of himſelf, and the ſaid* Dame Margaret *the longeſt Liver of them two, in* Conjunct-fee *and Life rent; and to the Heirs-male to be Procreat betwixt them; Whilks failing, to the ſaid Sir* James *his other Heirs, who are appointed to ſucceed him in his other* Lands *and Heretages.* And in caſe their ſhall be no Heirs Male, but Female; The ſaid Sir *James*

Binds and Obliges him and his forſaids, to provide them to the half of the ſaid Conqueſt; and the other half thereof to pertain and belong to the ſaid Sir *James* his other Heirs foreſaids. *Which* Proviſion above-written, the ſaid Dame *Margaret* accepts, likeas it is hereby declared, That the ſamen is granted and provided to her, and Heirs foreſaids to be Procreat of the ſaid Marriage, in full contentation and ſatisfaction of all other Conjunct-Fee, Terce, Third, Right of Moveables, Heretage, or any other Right whatſoever; except allennarly the Mannor, Place, and Dwelling-houſe of *Collingtoun*, and Yairds thereof, which are hereby appointed and allotted to the ſaid Dame *Margaret* for a Dwelling-houſe during her Lifetime. Providing always ſhe ſufficiently Maintain and Uphold the ſaid Houſe, and Houſes in as good Condition, as they ſhall be in, at the time of the ſaid Sir *James* his Deceaſe: And that ſhe ſhall not Directly, or Indirectly be her ſelf, or any others in her Name, or at her Direction, cut, or deſtroy any manner of growing Trees, or Planting about the ſaid Houſe or Yairds, or within any part of the Bounds of *Collingtoun*, for no pretext nor uſe whatſoever. And for the more Security, both the ſaids Parties are content and conſent that thir Preſents be inſert and Regiſtrat in the Books of Council and Seſſion, or in the Court Books of any other competent Judge within this Kingdom; to have the ſtrength of an Decreet of any of the ſaids Judges, and their Authority Interponed thereto, that Executorials of Horning upon an ſimple Charge of ten dayes and others competent, may be direct hereupon: And for that effect Conſtituts - - - - - Their Procurators, *promitten de Rato*, &c. In witneſs whereof, both the ſaids parties have Subſcribed thir preſents, (which are written be *Alexander Keith*, Servitor to Mr. *Andrew Gilmour* Advocate) day, place and year of God above written. Before thir Witneſſes, Sir *William Murray* of *Dreghorne* Maſter of His Majeſties Works, and Sir *John Foulis* of *Ravelſtone* Younger. Sic Subſcribitur *Ja. Foulis*, *M. Areskine*, *W. Moray* witneſs, *Jo. Foulis* witneſs.

Double

Double of the Summonds, *Dame* Margaret Areskine *againſt Sir* James Foulis *of* Collingtoun.

James, &c. Forſuameikle as it is humbly meaned and ſhowen to us by our Lovet Dame *Margaret Areskine* Relict of the Deceaſed Sir *James Foulis* of *Collingtoun*, late *Juſtice Clerk, and one of the Senators of our Colledge of Juſtice*. That where the ſaid perſuer therein deſigned Relict of the Deceaſed Sir *John Mckenzie* of *Tarbat* be her Letters of Aſſignation and Diſpoſition Subſcribed with her Hand, of the date the laſt day of *May* 1661. years (for the Cauſes therein ſpecified) Sold, Aſſigned, Transferred and Diſponed from her, her Airs and Aſſigneys; to and in Favours of Mr. *Adam Cunningham* of *Woodhall* his Airs and Aſſignes whatſomever: *All and hail* her Life-rent Right of the Lands, Teynds and others after ſpecified, *to wit*, Of all and ſundry the Lands and Barrony of *Innerteil*, therein comprehending the *Maynes* of *Innerteil*, Mannor, Place, Houſes, Biggings, Yards, Orchards, Dow-cat and pertinents thereof, *Bridge*, and Lands of *Bridge-lands*, called the Village of St. *Katherines*, with the Chapel of St. *Katherines*, and Gift of Chapellanry of the ſamen, with the Houſes about the ſaid Chapel, and ſpecial Pendicle of the ſaids Lands, called St. *Germans-Aiker*; together with all Edifices, Yards, Toſts, Crofts, Coals, Coalheughs, Lyme and Lyme-quarrel, with the *Mylne*, *Mylne-lands* and Multurs of the ſamen, Salmond Fiſhing, and other Fiſhings, as well in Salt as Freſh Waters. annexis, connexis, parts, pendicles and pertinents whatſomever of all and ſundry the Lands and Barrony of *Innerteil*, lyand within the Sheriffdom of *Fife* as principal: And alſo of all and ſundry the Lands and Barrony of *Glengarnock*. comprehending the ſpecial and particular Lands therein mentioned; and that in ſpecial Warrandice and Security of the ſaids Lands and Barony of *Innerteil*: And ſicklike of *all and hail* the half Lands of over and nether *Tyries*; with Houſes, Biggings and Pertinents thereof, lyand within the Re-

Regality of *Dalkeith*, Constabulary of *Kinghorne* and Sheriffdom of *Fife*, wherein the said Dame *Margaret Areskine* persuer was infeft upon the 25 day of *February* 1645. Years; and siclike *of all and sundry* the Teynd Shaves of *all and hail* the saids lands of *Innerteil* and *Bridgelands* of *Innerteil* with all and sundry parts, pendicles and pertinents thereof, and *of all and sundry* the teynd sheaves of *all and haill* the lands of *Sea-field* and the saids half lands of *Tyrie*, with their parts, pendicles, and pertinents abovementioned; And alse *of all and haill* the teynd sheaves of all and sundry the lands of *Balbartuon*, mylnelands thereof and pertinents of the samen; and *of all and sundry* the teynd sheaves of *all and haill* the lands of *Morislands* with their pertinents all lying in the said *Parochin of easter Kinghorn, and shirefdome of Fife*, and pertaining to the parsonage of the said paroch Kirk, specified and contained in an Tack set be the Earle of *Kinghorn* to the deceast Sir, *George Areskin* then of *Innerteil*, and Dame *Isabel Bruce* his Spouse, & assigned be them to the said persuer, together with the Fruits, Rents, Emoluments & duties of the samen, Males, Ferms Kaynes, Customs, Casualities Tack-duties and other services and duties due and payable to the said Dame *Margaret Areskin* for the saids Lands, Stock and Teynd thereof, and that during the second Marriage. With power to him to Call Follow and Pursue therefore, Decreets and Sentences thereupon to recover, and to remove and output Tennents therintil and to do all other things requisit annent the premisses; And thereby made and constitute the said Mr. *Adam Cunnigham* her Cessioner and Assigney in and to the foresaids Rights and Disposition of the samen: As the said Assignation and Disposition of the date foresaid at more length proports. Like as the said Mr, *Adam Cunningham* be his letters of Translation of the dait the last day of *May* 1661 years (for the causes therein expreст) sold, assigned, transferred, and disponed to and in favors of the deceast Mr. *Alex. Foulis* of *Ratho*, the foresaid Right and Disposition of the Conjunct-Fee Lands, Teynds and others above wirttten made and granted be the said persuer to him in manner above expreст; and

sur-

Tranſlation and Diſpoſition of the date foreſaid, at more length bears, *And ſicklike*, the ſaid Deceaſed Mr. A*lexander* F*oulis* of R*atho* be his back-band ſubſcribed with his Hand of the date, the laſt day of M*ay* 1661 years (Narrating the foreſaid Aſſignation granted be the ſaid perſuer to the ſaid Mr. A*dam* C*unningham* and the foreſaid Tranſlation granted be the ſaid Mr. A*dam* to the ſaid Deceaſed Mr. A*lexander* F*oulis*) Mentioning, that the ſaid *Umwhile* Mr. A*lexander* F*oulis*, taking to conſideration, that the ſaid Aſſignation, Tranſlation and Diſpoſition, and Right of Life-rent foreſaid therein mentioned, was made and granted to him, no ways for his own uſe, Utilitie, and Benefit, but that the ſamen was only made uſe of in his Name, and the ſame borrowed thereto, for the uſe, Utilitie, and Profit of the ſaid Deceaſed Sir J*ames* F*oulis* of C*ollingtoun*, and the ſaid perſuer his Spouſe during all the dayes of their Life-time joyntly for the Intertainment and Aliment of their Family allennerly, and upon thir expreſs Terms, that the ſamen, or any parts thereof ſhould not be lyable to be affected directly or indirectly with the burding of the ſaids perſons their Debts, bygone, preſent, or to come; and that none of their Creditors ſhould have any Action againſt the ſamen, or any part thereof: Therefore he band and obleiſt him to denude himſelf of the ſaid Life-rent Right, and of all Right, Tittle and Intereſt which he either had, or could have, claim or pretend thereto, or any part thereof: L*ikeas*, the ſaid Deceaſed Mr. A*lexander* F*oulis* be the Tenor of the ſaid Band *per verba de eodem*, did denude himſelf and his Airs therein mentionat thereof; and Band and Obleiſt him and his foreſaids to Diſpone, likeas he thereby Aſſigned, Transferred and Diſponed the ſaid Life-rent Right, withall Right, Title and Intereſt, Claim of Right, or Poſſeſſion which he had, or could pretend thereto, To and in Favours of the ſaid deceaſt Sir J*ames*, and the ſaid perſuer in manner foreſaid, with Power to them to uſe and Diſpone thereupon at their pleaſure, for the uſe and effect foreſaid allennerly, and upon the expreſs Proviſions and Conditions above writ-

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ten, and no other wayes; And in case it should happen the said Perseuer to survive the said Deceased Sir *James Foulis* her Husband. It is thereby declared, That in that Case the foresaid Right of Life-rent abovewritten was only in trust and to her own proper use and behove; like as in the forsaid case the said deceased Mr. *Alexander Foulis* band and obleist him and his forsaids, to transfer the premisses in favours of the said persewar, like as he thereby transferred the samen in her Favours: As the said back band of the date forsaid, insert and registrated in the Books of our Council and Session upon the 17 of *January.* 1667 years more fully proports. *And in like manner* be Contract of Marriage past betwixt the said deceased Sir *James Foulis* of *Collingtoun*, and the said perswar on the ane and other partes, of the Date, the first day of *June* and year of God foresaid 1661 years, in contemplation of the Marriage then Contracted and thereafter solemnized, the said deceased Sir. *James Foulis* band and obleist him, to Renounce, Quite-claim and overgive, like as he thereby renounced quite claimed and overgave, all Right Title and Interest which he *Jure mariti* could have claime or pretend in and to the said persuer her conjunct-fie or lyfe-rent Lands, Teynds and others belonging to her wherever the samen lye within this our Kingdom, Renouncing thereby all Benefit of the Law, or other Benefit whatsomever whilks might accrew to him by the said Contract or any manner of way whatsomever, to her said conjunct fie or Liferent Lands or any part thereof for ever, In Favours of the said persuer, to be used and disposed of at her pleasure, and did thereby take his hazard of what he might have otherwayes by the said persuar, And further the said deceased Sir *James Foulis* did thereby bind and obleis him his airs executors and successors, that in case it should happen him at any time during the Marriage betwixt him and the said persuer, To conqueis and acquire any sumes of money, lands or heretages, or to receive payment of sumes of money due to him, In that case, to imploy the same and take the rights and securities thereof in favors of himself and the said persewar the longest liver of them two in conjunct-fie or lifrent,

and

the said *Umwhile* Sir *James*, his other Airs who are appointed to succeed him in his other Lands and Heretages: As the said Contract of Marriage of the date foresaid Insert and Registrat in the Books of Our Council and Session upon the said 17 day of *January* 1667 years likeways more fully proports. *And true it is*, and of verity, that the said *Umwhile* Sir *James Foulis* the said persewers Husband during the time of the foresaid Marriage hes Conqueſt and Acquired, and hes received payment of sums due to him, which will extend to the sum of two hundreth and threescore thousand Merks, which by the foresaid Contract he was obleist to imploy and secure upon Lands and Heretages, and take the Rights and Securities thereof, in Favours of himself and the said persewer, the longest liver of them two: And by the foresaid Back-band the Mailles and Duties of the said Lyterent Lands, provided to the said Persewer in manner foresaid, extending yearly to the number of thirty six Chalders of Victual, was to be Imployed for the Maintenance of the said Deceast Sir *James Foulis*, and the said persewer their Family: Nevertheless the said *Umwhile* Sir *James Foulis* hes not Imployed and Secured the said sum of two hundreth and threescore thousand Merks Conqueſt and Acquired, and received by him as said is, and taken the Rights and Securities thereof in Favours of himself and the said persewer and the longest Liver of them two, in Conjunct-Fee and Lyte-rent, as said is; nor yet did he Imploy the said threttie six Chalders of Victual for the Maintenance of his own and the said persewers Family, but did actually uplift and Intromet with twenty four Chalders of Victual of the said 36 Chalders of Victual, for the particular years of God after specified, of the quantities, qualities and pryces after rehearsed, *viz* 22 Chalders of Bear, and two Chalders of Meal yearly out of the Lands and Barrony of *Innerteil*, and that for the Cropts and Years of God, 1661, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84 85, 86, and 1687 years, each Boll of the said Victual, Meal and Bear over head being worth six

Pounds Money of this our Realm *communibus annis* of the years above mentioned, conform to the Current pryces of such Victual growand in that part of the Countrey. And that the said persewer, during the said space of twenty six years, did Maintain the said Deceist Sir *James Foulis* his Family with all suitable Intertainment; and did pay the rent of his Lodging wherein he Dwelled during the said spaces, and payed all Servants Fees. *And albeit*, Sir *James Foulis* now of *Collingtoun* eldest lawful Son, and appeirand Air to the said *Umwhile* Sir *James Foulis* his Father, and Executor nominate and confirmed to him, at least Successor to him in his Lands and Heretages *titulo lucrativo post Contractum debitum*, and universal Intromettor with his moveable Airship Goods and Geir, and Charter Chist, ought and should secure the said persewer in an Lyferent Right during all the dayes of her Lyfe-time, of the said Sum of two hundreth and threescore thousand Merks Conqueist, Acquired and received by his said Father, as said is; and to make payment to her of the said 24 Chalders of Victual uplifted by his said *Umwhile* Father out of her said Lyfe rent Lands; which should have been applyed for the Maintenance of her Family as said is: And that for the particular years of God and Cropts above expreist, of the quantities, and qualities particularly above rehearsed, or liquidat pryces thereof above-mentioned, extending to the sum of *fifty nine thosand, nine hundreth and four Pounds Money* foresaid, after the Form and Tenor of the foresaid Contract of Marriage and other Writs above deduced in all points: Nevertheless he wrongously refuses so to do without he be compelled. *Our Will is herefore*, &c. Given under our Signet at *Edinburgh* the twenty day of *February*, and of our Reign the 4*th.* year.

In.

Information for Dame Margaret Areskine *Lady* Caſtle-haven,
Againſt
The Lord Collingtoun.

THE deceiſt *Lord Collingtoun* being ingaged in debts above the value of his Eſtate, In the treatie of Marriage betwixt him and *Dame Margaret Areskin*, by the advice of Lawyers, there was threttie Six Chalders of victual of the Lady's joynture conveyed before the Marriage in the name of *Ratho.* for the mantenance of the Family; And in the contract of Mariage *Collingtoun* did renounce his *jus mariti*, that his Ladys Eſtate might not be ſubject to his Creditors; and their being nothing to which he ſhould provide her, all her intereſt in the contract did depend upon this Clauſe, "*That incaſe he ſhall happen* "*at any time during the* Marriage *to conqueſce and acquire, any* "*ſums of money, Lands or Heretages, or to receive payment* "*of ſums of money due to him, in that caſe to imploy the ſame,* "*and take the* Rights *and Securities thereof in favours of him-*"*ſelf, and the ſaid* Dame Margaret Areskin *and the longeſt liver* "*of them two in conjunctfie*, And for this hope of Conqueſce, my Lady renounced the terce of heretages and third of moveables, competent to her by Law.

My Lady purſues this Lord *Collingtoun* as repreſenting his Father, for the lytrent of the ſums conqueſt and received by his Father during the Marriage And condeſcends upon the particulars ſums received by my *Lord Collingtoun* for 24 Chalders of Victual of the Lady's Joynture lands yearly, (beſides what was Imployed for the uſe of the Family) and for Sallaries, Penſions, and otherwayes.

It was alledged for the Defendar, 1. That it could not be ſubſumed that *My Lord Collingtoun* had aquired Lands or Heretages during the Marriage; and that ſums imployed for payment of Debts, or clearing a mans heretages from Incumbrances, was never underſtood *Conqueſce*, but only an acceſſory Right to the Heretage. And therefore in the competition be-

twixt an *Heire of Conqueſce*, and an *Heir of Line*, where the Predeceſſor had a null defective Right, and thereafter had aquired a valide and effectual Right to the ſame Lands, It was not found *Conqueſt* to belong to the *Heire of Proviſion*, but to belong to the *General Heire*, as accеſſory to the Heretage. 2. a *Clauſe of Conqueſt*, can never be underſtood to bind up the Fiar, or denude him of the Faculty and Capacity to imploy, or diſpoſe upon the *Conqueſt* at his pleaſure; and therefore *Clauſes of Conqueſce* Imports no more, but that ane *Heire of Proviſion*, or *Relict* ſhall ſucceed, or lyfrent, what Conqueſce remains undiſpoſed upon at the Fiars deceaſe, 3. The laſt clauſe (*or if I ſhall happen to receive any Sums due to me*) does relate to debts which was then due to *Collingtoun*, and particularly a ſum due by the Marqueſs of *Huntly*; and if that ſum ſhould be recovered, it was to be lifrented by my Lady. But the Clauſe cannot be extended beyond ſums due to him at the Marriage, and all ſums that ſhould become due to him did fall under the former *clauſes of Conqueſce*.

It was replyed for my Lady, 1. The clauſe in her Favours, Is not only a *Clauſe of Conqueſce*, But to take off all debate, or Cavil that might ariſe anent the Interpretation of *Conqueſce*, this ſpecial Clauſe is ſubjoined, that whatever ſums my *Lord Collingtoun* ſhould receive, *Eo ipſo*, that he received the ſums, he became bound to imploy them in lyfrent to my Lady, and this by the advice of *Lawyers*, who could expect nothing from the *Lord Collingtoun*, but his Penſions and Sallaries from the King, to which he had great pretenſions; theſe ſums as ſoon as ever they came to be received, became ſubject to her Lyfrent; and therefore my Lady has it in her Option, either to inſiſt on the *Clauſe of Conqueſce* for all the ſums of mony that were imployed in the redeeming of the Eſtate of *Collingtoun*, or for the Lyfrent of the ſums Lybelled as he received them.

2. *Clauſes of Conqueſce*, are moſt ordinary and known ſecurities; and it were abſurd and againſt the common Faith of Contracts of Marriage (which of all others ought to be moſt Sacred) to render ſuch obligations Eluſorie, and at the arbitriment of the

partie

partie ingaged, and debitor in theſe obleiſments. And albeit *Heirs of Proviſion or Conqueſce*, as they are *Creditors*, ſo they do repreſent and ſucceed; and as they can have no Action againſt their Predeceſſor, ſo they are bound to have a regard; and the *Law* in ſome Caſes hath releived them from the ſeverity of their obleiſment in favours of their own Succeſſors, and hath allowed them a latitude to diſpoſe, or imploy their conqueſt to all neceſſary and even rational uſes; But a Wife is meerly a *Creditor*, and therefore the obleiſment of *Conqueſce* in her favours, ought to be more ſtrictly and rigidly obſerved then to *Heirs*. And yet the *Law* nor *practique* did never relax any obleiſment of *Conqueſce* to tha. degree; that the debitor in the obleiſment might prejudge the obleiſment, and totally evacuat the ſame; and certainly it were a plain defrauding of this obleiſment, If *my Lord Colligtoun* did imploy the conqueſt of this Marriage, to releive his Eſtate, of debts contracted in a former. And if this Doctrine hold, if their had been Heirs of this Marriage, they ſhould not have had a ſixpence, notwithſtanding they are provided out of the Conqueſce, which would looſe all the Faith and Security of Contracts.

3. Whatever latitude the *Lords* may take, where a Wife is otherwayes provided, and hath only the Conqueſt as a General and acceſſory clauſe, yet where a wife gets nothing but the Conqueſce it were abſurd totally to fruſtrat and defraud Her.

4 In contemplation of this *Conqueſce*, the *Lady* did renounce a third of the Eſtate of *Collingtoun*, and it is inconſiſtent with the Reputation or Juſtice of the Seſſion to debar her from the *Conqueſce* by ſuſtaining the imployment of the *Conqueſt* for redeeming of that heretage whereof ſhe had renounced her terce.

5. The other half of the Clauſe puts the debate of *Conqueſce* out of Doors, and founds the *Ladies* Right upon the preciſe receiving of mony. And whereas it is pretended that the Clauſe is only relative to ſums due at the Marriage, and not to ſums that ſhould become due during the Marriage,

It is anſwered, 1. This is no diſtinct Clauſe, but a ſeparat view or part of the former, viz. *And in caſe he ſhall happen at*

any

any time during the Marriage to conquesce, and acquire sums of Money, Lands, or Heretages, or to receive any sums of money due to him viz *During the* Marriage, Which is understood to be repeated, as well at the last, as at the first part of the clause; And if it had been otherwayes designed, it had been easie to have Expres't it thus (*presently belonging to him*) And the word (*due to him*) was to exclude my Lady from any interest that she might pretend to sums borrowed and received by him. And it is evident that it is all but one Clause, because the obleisment to Imploy is subjoyned to both. And therefore the words (*acquired during the Marriage*) must be understood to be repeated in relation to the sums received due to him, as well as the sums, Lands, and Heretages, are to be imployed to my *Lord* and *Lady* in lyfrent and *Children* in fie. 2. In common Stile when men speake of sums belonging to them at the time, they doe not say (*received,*) but in case they shall uplift, or where the sums are doubtful, incase they shall recover; and (*Receive*) is never used but either in relation to Donations, or where money is offered, and the parties required to receive their Money. 3. It cannot be condescended upon that any sums of Money were due to *Collingtoun*, but an pretended Debt due by *Huntley*, which single Debt could never answer the Clause (*in case I shall receive sums*) And certainly if this Debt had been designed, it would have been expres't; for where there is only one particular under consideration, no body uses to express that single thing under a generality, when there is nothing else can be included. 4. If this Clause had been meant of *Huntley*'s Debt, why was the Lyfe-rent only granted, in case the sum were received, for a mans uplifting and recovering his own was never *Conquesce*; and therefore if this Clause had been meant to extend no farther then Debts due to *Collingtoun* the time of the Marriage, the *Lady* would have been provided to the Lyferent of all Debts due to him without that condition and quality (*In case he should receive them.*) But the truth is, my Lord *Collingtoun* was a man of more ingenuity then to have sham'd his *Lady* with mentioning this Debt, which neither is

nor

is but of a few dayes before the Sentence againſt the Marquess of *Argyle*: And it was then perfectly underſtood, that *Huntely* was to be Donator to *Argyles* Forfeiture; in ſo far as concerned *Huntley*'s Eſtate; ſo that this Debt was for ever excluded. But ſuppoſe there were no Forfeiture in the Caſe; the expyred Compryſings did abſolutely convey his Eſtate; and it was poſſeſſed be the Marqueſs of *Argyle* be vertue of theſe Compryſings, and not be the Forfeiture, for this Debt was never worth the regarding, much leſs to be the only ſubject of the ſeparate Clauſe. 5. In this Senſe, the Clauſe had been ridiculous and of no Security to my *Lady*; for if her right to Lyfe-rent the ſums due to *Collingtoun* did depend upon his pleaſure in upliſting and recovering theſe ſums; then the obligment imports no more, then that my *Lady* ſhould Lyferent what he pleaſed; for it could not be expected that he would prejudge his Heirs by upliſting ſums only to gratify his *Lady* with a Lyferent: And theſe abſurdities muſt convince, that this can never be the genuine meaning of the Clauſe; but the deſigne is plain, and the words are adapted to *Penſions and Sallaries which he ſhould receive as due to him during the Marriage*: And it is a general Rule in the Interpretation of all Contracts and Clauſes, *That, that Senſe and Conſtruction ſhould be admitted, whereby the Clauſe ſhould not be ſuperfluous, redundant, and ridiculous*: And in this Caſe, the Clauſe muſt either operate a Lyfe-rent of the ſums Conqueſt, or of all the ſums received; or elſe all the Proviſions in Favours of the *Lady*, for which ſhe renounced her Terce, and third part, was ſuperfluous and eluſory. 6. By the Clauſe in the Contract of Marriage, my Lord *Collingtoun* being obliged to Imploy, *All ſums of Money, Lands, or Heretages, that he ſhould happen to acquire, or ſums of Money due to him, whereof he ſhould receive payment during the Marriage*: Albeit the *Lady* might juſtly crave the Lyferent of all the ſums of Money that can be inſtructed my Lord *Collingtoun* received during the Marriage, which is the expreſs Terms in the Clauſe of the Contract, yet

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he declares that he insists only upon the Clause in these effects

1. That what Debts my Lord *Collingtoun* has payed due prior to the Marriage, with Sums of Money acquired and received during the Marriage, that she should have the Lyfe-rent of the same upon this ground; because if these Debts had not been payed, they would have affected this Lord *Collingtoun* the Son; and he would have been lyable for the samen; so that in so far as the Son and Heir reaps Benefit, by Imploying the sums his Father received during the Marriage, for payment of Debts prior to the Marriage, for which otherwayes he would have been lyable, as representing his Father, the *Lady* ought in so far to have right to the Lyfe-rent of the sums with which the Lord *Collingtoun* payed the prior Debts 2. The Lord *Collingtoun* did not only reap Benefit by his Fathers payment of prior Debts with sums of Money that he received during the Marriage, but also the subject that he has acquired by these sums he received during the Marriage, being extant at the dissolution of the Marriage: The *Lady* by vertue of the foresaid Clause in her Contract, must have Right to the Lyfe rent of what was acquired during the Marriage, and extant the time of the Husbands Decease; and therefore in making the Computation of what the *Lady* should have Right to Lyfe-rent, the Lord *Collingtoun*'s condition, and the condition of the Estate is to be considered, as it was the time of the entry into the Marriage, and as it was at the time of the Dissolution thereof; and in so far as the Estate is meliorat, and what the Lord *Collingtoun* had more at the Dissolution of the Marriage, then he had the time of the entering into the Marriage, that must be understood to have been acquired during the Marriage, and the *Lady* must have the Lyfe-rent of the samen; especially seing in all such cases, where the Wife is provided to the Lyfe-rent of what should be Conquest and Acquired during the Marriage: The *Lords* are alwayes in use to take Tryal of the Husbands Condition, the time of the entering into the Marriage, and of his Condition the time of the Dissolution thereof; and what ever his Condition was better at that time, then it was at

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the time of the entring into the Marriage, that is esteemed *Conquesce* to give the Wife the Benefit of the Lyfe-rent of the samen, which is clear by several *Decisions*, and particulary the 4th. of *March* 1623. *Skeen* contra *Robieson* " *Where* " *the Husband by his Contract of Marriage being oblidged to* " *give a* Lyferent *of the Conquesce during the Marriage to his* " *Wife, and the* Fie *to the Heirs of the Marriage: And he* " *having acquired certain Lands and Fishings that did hold of* " *the Town of* Aberdeen *in his Sons Name; and the Relict ha-* " *ving pursued the Son, as representing his Father upon the* " *passive titles, for the lyfrent of the Lands and Fishings: And* " *it being alledged that she could not have the lyfrent of these* " Lands *and Fishings because by ane Act of the Town of* Aber- " deen *which was confirmed by the* Queen, *the Lands and* " *Fishings could not be fewed nor lyfrented by a Woman; upon* " *which the* Lords *found that albeit the Relict could not lyf-* " *rent the Lands and* Fishings, *yet the Heir should give her* " Damnum et interesse, *because the Husband could not be al-* " *lowed to make any purchass that could prejudge the Wife of* " *her lyfrent.* And the 3d of *July* 1627. The *Lady Dumferm-* " *ling contra the Earle her Son, Where by the contract of* Mar- " *riage, the* Lady *being provyded to all Lands that should be* " *conqueest during the* Marriage, *and her Husband having ac-* " *quired certain* Lands *during the* Marriage, *and taken the* " Rights *in his Sons name, the* Lords *found that the* Lady *had the* " *right of the lyfrent of the same: albeit it was alledged that the* " *price of the* Lands *was not payed, but was resting the time of* " *his Fathers decease, and that the Son as representing him is ly-* " *able for the same.* And it is subjoin'd that the like *Decision* was " done the 11 of *Januar.* 1632. *The Lady* Bonnington *contra* " Hadden and the 27 of *Jun.* 1676 The *Earl of* Dumfermling " *contra the Earl of* Callander, *where the* Lords *found that a* " *general* Clause *of* Conquesce *did extend to what the Husband* " *had acquyred during the Marriage, more then what he had* " *the time of the contract of Marriage, & with the burden of all* " *his Debts contracted during the Marriage; that was esteemed*

Conquesce which was free over and above the debt contracted during the Marriage. By which it is evident that in so far as the Estate was meliorat, and in a better condition the time of the dissolution of the Marriage, than it was the time of the contract, that was to be esteemed *Conquesce*; and that no debts were to be deduced, but these that were contracted during the Marriage. And as to the *Decisions* adduced for the *Lord Collingtoun* the 26 of *November.* 1629 *Where the* Lords *found that Lands being acquired be the Husband from the Seller of the Lands, and thereafter disponed in few again to the same seller for ane greater few duty than was contained in the sellers priors Rights, The augmentation of the few duty be the Husband could not be repute ane Conquesce, whereof the Relict might Claim a lyfrent, as coming under the clause of Conquesce of the contract,* And in the case of *James Wauchop contra the Laird of* Niddrie, *in the year* 1683. *where the husband having right to the Lands prior to the Marriage, and during the* Marriage *having acquired partial Rights, were not found to fall under the clause of Conquesce.*

It is answered that these *Decisions* doe not meet this case; for as to that of the *Lady Dumfermling against her Son,* It was in the case betwixt a Superiour and a Vassal, where a Superior having pursued a Reduction against his Vassal, and the Vassals rights being found null for want of Confirmation, and the Superiour having given a new right to the Vassall for augmentation of the few-duty; that was not found *Conquesce,* In respect there was no new acquisition, the Superior having right to the Lands before the Marriage; and his right to the property of the *few* being only declared after the Marriage, by reduceing of the Vassals right; and therefore albeit the Superior gave a new right to the Vassal, augmenting the few duty, That augmentation was not repute *Conquesce,* to give the Relict the benefit of the lyfrent thereof: And that this was the case of that *Decision,* it is cleare by the *Decision* the last of *June* 1629. Betwixt the same Persons. And as to the Case of *Niddrie and his brother,* first the question there was, betwixt the *Heir of Line,* and the

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Heir of Conqueſce of the ſecond Marriage, which does not meet in this caſe. Next the partial rights acquired by the huſband after the Marriage, was found not to fall under the Clauſe of *Conqueſce*, in reſpect that the Husband had belonging to him of money, and other eſtate of great value, prior to the Marriage, of which, any ſums of money he depurſed after the Marriage in acquiring rights to the Lands, was the true product, and might be aſcribed to the ſums of money, and other eſtate which belonged to him before the Marriage.

And as to the caſe of *Cowan contra Young* the 9th of *February* 1669, *where a Father having given a bond of Proviſion of* 400 *pound to a Daughter of the firſt Marriage, was ſuſtained, and found to affect the* Heir *of Conqueſce of the Second* Marriage; And the 15 of *July* 1673 *Robertſon contra Robertſon, where the* Lords *found that a clauſe in a contract of Marriage providing the lyfrent of the conqueſce to the Wife, did not hinder the* Husband *to give competent proviſions to the* Children; And *Smith contra* Muire, 23 December 1668. *Where it was found, that ſuch a clauſe did not prejudge* Creditors; *but the* Relict *that intrometted with the moveables falling under the conqueſce, was found lyable for the Debt*; And in the caſe of *Frazer contra* Cumming, the 8 of December 1687. *Where the* Lords *found the Proviſion granted to the* Children *of the firſt* Marriage *was to be deduced out of the conqueſce in prejudice of the Relicts lyfrent, as alſo that his debts ought to be deduced and* 11000 *pound that he had reſerved to himſelfe be the contract of Marriage, and the ſuperplus only to be repute* Conqueſce.

It is anſwered, that the caſe of *Cowan* & *Young*, being betwixt a Child of the firſt Marriage and the Heir of Conqueſce in the ſecond Marriage, it did not meet the caſe of a lyfrenter; next it was only but a ſmall proviſion granted be a Father to his Child of the firſt Marriage, whom be the Law of Nature he is obliged to provide. As alſo in that Caſe the Heir of the ſecond Marriage had a ſpecial proviſion, and ſomething alſo of the Conqueſce, ſo that the Fathers granting a moderate proviſion to a Child of the firſt Marriage, was not underſtood a defrauding

of the Children of the ſecond Marriage. And the caſe of *Robertſon contra Robertſon*, albeit the *Lords* found, that ſuch clauſes could not exclude competent proviſions to the Children of the ſame Marriage, which was moſt Juſt, yet it is with this expreſs quality, that there were competent means, for a proviſion to the Mother remaining, and that the husband had done nothing fraudfully in prejudice of that clauſe. And the caſe of *Smith and Muir*, was betwixt a Relict and a Creditor, And it is not controverted but that a true and Lawful debt contracted by the Husband during the Marriage, ſhould deduce off the Conqueſce, And as to the Caſe of *Frazer and Cumming* it was thus, *By contract of Marriage betwixt* Alexander *and* Chriſtian Frazers, *The Husband did provide his Wife to ane certain yearly Annuitie in lyfrent, and likewayes to the lyfrent of the clauſe of conqueſce, reſerving to himſelf certain tenements of* Lands *and others extending to* 11000 *pounds; and all the queſtion there was in relation to the import of the* Reſervation *as to the* 11000 *Pounds, if the Husbands Debts ſhould affect the* 11000 *pounds, or be deduced out of the* Conqueſce. Upon which the Lords *found that the import of the clauſe of the Contract, is, that in the firſt place, There ought to be deduced out of the Husbands Eſtate extant the time of his Deceaſe, the Debts then due; and next that the* 11000 *Pounds is to be deduced, and what remains only is to be repute Conqueſce.* By which it is evident that the 11000 Pounds that belonged to the Husband the time of the entring into the Marriage, was deduced in reſpect of the expreſs reſervation. And albeit a Husband may grant a Proviſion to a Child of the firſt Marriage, yet it will not follow, that he can do ſuch Deeds in defraud of the Relict, as may abſolutely evacuat the Clauſe. As alſo in that Caſe, the Relict had a ſpecial Lyfe-rent Proviſion, beſides the Lyfe-rent of the *Conqueſce*. And that *Deciſion* is ſo far from making againſt the *Lady*, that it makes expreſly for her: In ſua far as in that Caſe, the Lords ordained Probation to be led for proving the Condition of the Husbands Eſtate the time of entering into the Contract of Marriage; and

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what was the worth and value thereof the time of the Diſſolution of the Marriage: To the effect that in ſua far as the Husbands Eſtate was better the time of the Diſſolution of the Marriage, than the time of the Contract: The Relict might have the benefit of the Lyferent thereof as *Conqueſce*. And as to any other *Deciſion* alledged upon for the Lord *Collingtoun*, they are either in the Caſe of a Competition betwixt the Heirs of a firſt and ſecond Marriage, or in the Caſe betwixt Heirs of ſecond Marriages and Creditors, which does not at all meet this Caſe.

And whereas it is alledged, that the *Lady* has *aliunde*, a ſufficient Joyntute, albeit ſhe get nothing of the Lord *Collingtoun*, and ſo is not deſtitute of a Proviſion.

It is anſwered, That albeit the *Lady* have a Joynture *aliunde*, yet ſeing ſhe has nothing from the Lord *Collingtoun*, except the Houſe and Yards of *Collingtoun*, which is not worth the ſpeaking of; yet that can be no Argument why ſhe ſhould not have a Joynture off the Lord *Collingtoun*, be vertue of that clauſe in her Contract of Marriage, his Father having received ſo great ſums of Money during the Marriage, partly out of the Ladie's Joynture, and partly out of his Penſions and Sallaries, by which he made his Eſtate ſo much in a better condition the time of the Diſſolution of the Marriage, than it was the time of the Contract: And albeit the Lady get a large Joynture, yet the Lord *Collingtoun* will not be deſtitute of a Proviſion, ſeing he has gotten a large Eſtate with his Lady.

In reſpect whereof, &c.

Additional Information for the Lady Caſtle-haven; againſt the Lord *Collingtoun*,

TO evince the *Ladie's* Claim beyond exception; and in anſwer to all the Practicks that have been, or can be obtruded: The Purſuer not only inſiſts upon the foreſaid clauſe anent the Lord *Collingtoun* his receiving payment of ſums

ſums of Money due to him during the Marriage: But farther doth preſs preciſly the former clauſe of *Conqueſce*, *viz.* That the Lord *Collingtoun* hath Conqueſt and acquired ſums of Money during the Marriage: For ſeing that it is undeniable, that he hath cleared and reconqueſt his own Eſtate, which before, the Marriage was ſunk in more Debt then it was worth; and that this could not be done without his acquiring of ſums of Money: It is evident that he hath acquired ſums of Money, and that theſe acquiſitions are really ſtill extant, if not in *Specie*; yet in their undeniable effects. If the Purſuer were only inſiſting upon *Collington*'s Conqueſcing and Acquiring of Lands and Heretages, and urging that the Reconqueſcing of his Eſtate was a real Conqueſce. The practick touching the clearing of old Wodſets, and the purchaſing of acceſſional Rights, and finding theſe to be no new Conqueſce of Lands, might be objected with ſome ſhew of reaſon; but the Caſe of theſe Practicks was only concerning Conqueſce of Lands, which is not the principal point now in Controverſie: But the point here urged is, That the Lord *Collingtoun* did purchaſe and acquire ſums of Money; and this is evidently made out both that he did acquire them, and that they are yet truly extant; ſo that its impoſſible to fruſtrate the Purſuer of the benefit of this head of the Conqueſce, unleſs the Defender can as plainly make it out, that the Lord *Collingtoun* did Reconqueſce the Eſtate, by ſums not of his own acquiring, but by the Defenders Tocher and Means, which can never be made out; ſeing the Conqueſce of the Eſtate doth far exceed all the Portion the Defender got with his Wife, and there is a great part of that yet unreceived. Neither is it to any purpoſe to debate here, how far the Lord *Collingtoun* might exhauſt his Conqueſce by contracting of Debt, or doing other Rational Deeds, ſeing that the Debt which the Lord *Collingtoun* left at his Death, is always acknowledged, that it is to be deduced; and for other rational Deeds there is none can be alledged, except the conveying of his Eſtate to his Son and appeirand Heir the Defender, which is no exhauſting, but a tranſmitting of the

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to perform his Fathers obligment. Its true, it is alledged that the Lord *Collingtoun*'s paying of his old Debts with the Moneys that he acquired, were rational Deeds: But it is as true, that these Deeds does no wayes exhaust the Conquesce, but rather establish it: It being plainly ridiculous for a man to alledge, that his getting and applying sums of Money for the payment of his Debt, and clearing of his Estate, and thereby making himself Richer, should be an exhausting of Conquesce, since it is absolutely the best evidence can be brought for it, and the best use that can be made of it; so that all the practicks about the exhausting of rational Deeds are here Impertinent, and prove nothing. Nor is there the least Injustice in what the Defender alledges for a great Absurdity, *viz. That the* Heir *Male of the Marriage (if any had been) should by this means have carried away my* Lord Collingtouns *Estate from his Son in the former Marriage:* For not to insist upon the good Estate, the Lord *Collingtoun* hath got by his Marriage, what could be more reasonable then that the Heir Male of the Marriage should have the Fee of what was really acquired during the Marriage.

And therefore seing this Obligment of Conquesce is made to the Pursuer in her Contract of Marriage, and that its undeniable that the Lord *Collingtoun* did Conquesce and Acquire sums of Money, which are yet most really extant in their abiding effects: It is impossible the Lady can be deprived of her Lyterent thereof, in sua far as the sums were truly acquired by him, and not brought into the Family by the Defender *aliunde*.

Information for my Lord Collingtoun, *against. The* Lady Castle-haven *Relict of the deceast* Lord Collingtoun *his Father.*

WHen the deceased Lord *Collingtoun* was Married to his last Lady in *Anno* 1661 he was under considerable burden of Debt; and least my Ladies Joynture of 80 Chalders of Victual,

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By her former Husband might be affected by my Lords Credi-
tors, several conveyances thereof were made in trust and by the
Contract of Marriage my Lord did Renounce his *Jus mariti*
to the said Joynture, and took his hazard of what he might have
otherwayes by my *Lady*, and farther my Lord bound and ob-
lidged him, *that in case it should happen him at any time dur-
ing the Marriage betwixt him and his said* Lady, *to conquesce
and aquire any sums of Money*, Lands *or* Heretages, *or to re-
ceive payment of sums of Money due to him; in that case, to im-
ploy the samen in favours of himself and his future* Spouse *in con-
junct fie and lyfrent, and the* Heirs *male to be procreat betwixt
them, which failing to my* Lord, *his other* Heirs *who are appoint-
ed to succeed him in his other* Lands *and* Heretages.

There is a process at the *Ladies* instance against this Lord *Collingtoun* as representing his Father upon the passive Titles, libelling that "*the defunct did after the Marriage, conquesce and acquire the Sum of* 260000 *Merks*, and concluds that the *defender should be decerned to imploy the same for the Pursuers Lyferent use:* And urges that conclusion upon the clause of the Contract of Marriage above mentioned, containing two separate and distinct obligments: The one, *To take the* Lands, Heretages, *and sums of* Money *to be* Conquesced *during the Marriage:* And the other, *To Imploy all sums of Money due to him, whereof he should receive payment, during the Marriage, likewise to my* Ladie's *Lyferent use;* Whereby it doth appear, that my Lady did not intend to rest upon a clause of *Conquest* in the usual Style, but did farther provide for her own security, by adjecting the posterior Clause, obliging my *Lord* to imploy all sums of Money to be received during the Marriage, to her liferent use, which was most Just and Reasonable, seing my *Lords* condition at the time did not suffer him to secure any present joynture, his Estate being affected with many incumbrances, it was therefore highly reasonable that what ever sums he should receive during the Marriage, should be secured for her liferent use.

It was answered for the Defender denying the passive Titles,

that

tained in the contract of Marriage, unless the Pursuer will condescend upon Lands, Heretages, sums of Money, Conquest *during* the Marriage, and extant unconsumed at the *Dissolution* thereof: Or that the *Defunct* had received sums of Money due to him *the time of the contract* of Marriage: for as to the Clause of *Conquesce*, There has been no point in our Law more fully and clearly determined, than the Import thereof both in relation to Heirs of Provision and Relicts in Contracts of Marriage: for the various circumstances of Children, or Relicts having the benefit of those Clauses, have prompted them upon several Specialities, to endeavour the extensions of such Clauses in their Favours, upon some pretences of differences from the Cases formerly decided, whereby upon consideration of the most important *Decisions* in that point, it will appear that the Lords have scarce ever varied, since there were Practicks upon Record, anent the import of Clauses of *Conquesce*, which they have ever found to give Relicts, or Heirs of Provisions, the Benefit of what Conquest did remain unconsumed at the death of the Husband, or Father; and that such Clauses could not hinder the *Acquirer* from the full, free, and unaccountable Administration of his own Estate during his Life, and to dispose of his own by any just or rational Deed at his pleasure: providing that nothing were done fraudulently for evacuating of such Clauses. *And farther*, The Deeds of the *Acquirer* are not only sustained when the Conquesce is consumed, but even when the Conquesce of Lands, Heretages, or sums of Money is extant at the dissolution of the Marriage; the same is affected and burdened with all the Debts of the *Acquirer*, not only for onerous, but also for gratuitous Causes; there being always a just and rational consideration, such as the Provision of Children with suitable Portions; and even a Provision of an eldest Son hath been frequently sustained as a paternal Deed; and if in any Case gratuitous Debts or Deeds, of the *Acquirer* have been annulled, at the instance of Relicts, or Children of a Marriage; the same has always been upon the head of Fraud,

of that there was no juſt cauſe for making ſuch Deeds, and theſe Deeds are not only ſuſtained in favours of *Creditors* to affect the Conqueſce, but they have even been ſuſtained as burdens upon the Conqueſce, whereby Relicts or Heirs of Proviſion have no Action againſt the Repreſentatives of the *Acquirer*, to Disburſt the Conqueſt of theſe Debts: The *Deciſions* in this matter are ſo numerous, and the Caſes ſo various, that it were tedious to relate them; but the *Defender* did both in his Debate, and by a particular Note a part offer a few of them to the Lords conſideration, whereby it will appear, that the ground of all is one, *viz.* *That Conqueſce is burdened with all rational Deeds of Adminiſtration of the Acquirer.*

As to the ſecond Clauſe, whereby it is pretended, that, *All ſums of Money due during the Marriage, and received by the Defunct, ought to be Imployed for the Purſuers Liferent uſe.* It is anſwered, That the Lords are intreated to conſider the Clauſe as it ſtands in the Contract, which is very far from Importing that Senſe which is fixed upon it: For by the firſt Clauſe, the Conqueſce during the Marriage was deſigned to be ſecured in the ordinary Style of Conqueſce: And by the ſecond all ſums due to my Lord before the Marriage, were deſigned to be ſecured to my Lady, and that which was in Proſpect, was a Debt due upon the Eſtate of *Huntley;* And my Lord had juſt ground to expect, that the ſame might have been made effectual to him, who was then in great Favour, and had ſuffered much for the King; and it was not fit to expreſs the Debt particularly in the Contract, leaſt being propaled, it might have been affected by his Creditors; and as this was the true Communing, ſo it is impoſſible the words of the Clauſe can bear another Senſe, which runs in theſe Terms, *viz.* *He obliged himſelf in caſe it ſhould happen, him to purchaſe, or acquire ſums of Money, Lands, or Heretages, or to receive payment of Debts due to him, to imploy,* &c. Whereof the conſtruction of the laſt Clauſe is, in caſe he ſhall happen to receive payment of ſums due to him, where *Sums due*, muſt in propriety of Language ſignify a *Preterit*, that the ſums

were

ture, was in caſe it ſhould happen him to receive theſe ſums: And the proſpect of receiving of ſums, muſt alwayes preſuppoſe the ſums due. And the firſt end of the Clauſe relating to *Purchaſe* of ſums thereafter, the natural *Alternative* ſubjoyned to that Proviſion, is ſums dew already, whereby all ſums were ſecured to my Lady, whether due before, or purchaſed after the Contract, with the legal burden of my Lords full and free Adminiſtration during the Marriage. And whereas the words of the Clauſe (as the Purſuer would conſtruct them) run thus, *In caſe it ſhould happen my* Lord *during the Marriage to receive payment of ſums deue*; even this conſtruction, though it be not natural, or ſuitable to the Clauſe, yet it alters not the Caſe one hairs breadth: For in that conſtruction the words (*during the Marriage*) which ſignify *Futurition*, have not the leaſt relation to ſums due, which are ſtill in *Preterito*; but they do only relate to the receipt of the Money: So the Clauſe doth import, that if ſums then due ſhould be received during the Marriage, they were to be Imployed; but it is altogether force againſt the natural conſtruction to mention theſe words, *During the* Marriage, In the firſt Clauſe, which can neither relate to the Receipt of the Money: Becauſe if that Money upon the Eſtate of *Huntely* ſhould be received or ſecured, though after the Diſſolution of the Marriage, the Purſuer would have a Liferent thereof by the Clauſe, which ſhe could not claim, if the condition run, *In caſe during the* Marriage *the* Money *were rece ved*: Neither is it poſſible that the words, *During the* Marriage, can relate to ſums due: For *Sums due during the Marriage*, is Nonſenſe, *Sums due*, being *Preterite*, and *during the* Marriage, being then *Future*; unleſs for my Ladies Conveniency, ſhe be allowed to add a word or two, to make the Senſe as ſhe would have it; and that ſhe ſhould be permitted to Interpret the Clauſe, in thir Terms, *viz Sums falling due, or becoming due during the* Marriage, For without the Addition of theſe words, or other of the like Import, it is impoſſible in nature

that ever these words [illegible] by
any construction that can be forced upon the Clause, as it stands: And if such violence were put upon it, then it would still disagree with what has been evidently communed, *viz*, *That* Huntleys *Debt already due should be Liferented, if received*: For if only sums falling or becoming due *Thereafter*, were to be imployed, then there were no Obligation, as to these which were *already* due; And it would be a wonderful streatch that could make the same words signify both *Preterite* and *Future*.

Secundo, Suppose the words of the Clause should be strained (as the Pursuer contends) to an Obligment of *Imploying all sums due during the* Marriage; yet it is not possible to extend the Importance of that Clause, farther than an ordinary clause of Conquesce; and consequently the *Husbands* Obligation would only be prestable with the burden of all rational Deeds: For the Clause of Conquesce oblidges, to bestow, *All sums of Money Conquest during the* Marriage: And the second Clause obliges (as is pretended) to Imploy, *All sums falling due during the* Marriage *to be received by the Defunct*; Which is all one Clause; for all sums falling due during the Marriage, that the Defunct could receive, must be sums *Conquest* during the Marriage; and consequently if the Obligment to imploy the Conquesce, cannot secure the Pursuer from the burden of all rational Deeds, neither can the Oblidgment of imploying sums falling due, which is the same thing: And it is not the variation of the Style, or words, that will evert the effect of such a train of *Decisions*; nor is it possible that the *Defunct*, or any reasonable man would have agreed to such an extravagant Clause, whereby all his Fortune was then wholly over-burdened, so he should have been Incapacitate for ever to render it in a better condition for himself, or his Heirs: For though in this Case there be eventually no Children of the Marriage, which might probably have existed, my Lady being then little past 40. And being as careful to provide for them, as her self; yet if they had existed, the Defunct would have been Incapacitate

that his eldeſt Son might ſucceed, which in conſequence would have drawn his Creditors upon him; that he could not have had his perſon ſafe, when they found that he could not apply one ſixpence for their payment out of what he had, or could acquire.

It was replyed, that the Purſuers Lybel is moſt Relevant, both upon the *Conqueſt*, and ſubſequent Clauſe: And albeit, the Purſuer doth not alledge, that any ſums of Money, Lands, or Heretages, Conqueſt during the Marriage, are extant, ſeing the Defunct did apply theſe ſums acquired, and falling due during the Marriage, for payment of the Debts affecting the Eſtate and Lands of *Collingtoun*. The Defunct being *Locupletior factus*, by applying theſe ſums for the Relief of his own Eſtate, which by the Conrract ought to have been imployed for the Puſuers Lyferent uſe, the Lady ought to have the benefit thereof, and doth not claim any Lyferent of ſums ſpent and conſumed; but where there is ane exiſting benefit inriching the Defunct, ſhe ought to have a lyfrent of the Lands releived to which ſhe reſtricts her lybel, and craves no more neither upon the firſt nor ſecond Clauſe of the Contract. 2. *Conqueſce* in favours of Wives or Children, is alwayes underſtood in ſo far as the *Husband* is richer at the *Diſſolution* of the Marriage, than he was at the time of the *Contract*. And the defunct being richer in the value of the hail Lands redeemed, my Lady ought to have the lyfrent thereof. 3 Deciſions in matters of *Conqueſce* have varied according to the circumſtances of the caſes Debated, and all of them have this notable difference from the Purſuers Caſe, that in theſe *Deciſions*, the Relict had ſpecial ſuitable proviſions, and the *Conqueſts* were only adjected as general uncertaine Clauſes upon which the Relicts did not depend. But here there is no ſpecial proviſion, except the Houſe and Yeards of *Collingtoun*, and all that was depended upon, was the clauſe of *Conqueſce* which was adviſed by my Lord *Dirlingtoun*, and eminent Lawyers, who thought fitter to take the defunct obliged in the termes of the Contract than to take a

ſpecial

it cannot be imagined that ſo eminent a Lawyer would adviſe a clauſe that would be abſolutely *Eluſory*, tho' the defunct made his fortune during the Marriage, 4. There are alſo ſeveral *Deciſions* which fortify the purſuers Caſe, as particularely a deciſion *Skeen* contra *Robertſon*. 4 *March* 1624. where *a band of Proviſion to a Daughter was found to be lyable to the Relicts lyfrent by her clauſe of Conqueſce*. And in the ſame caſe, the Huſband having acquired right to a *Salmond* Fiſhing near *Aberdeen*, which by the cuſtom of the place could not be bruiked by a Woman, yet the relict by her *Conqueſce* was found to have *utilem actionem againſt the heir for the value*, And in the caſe of the Counteſs of *Dumfermling* againſt her Son (Lands being conqueſt originally in the name of the eldeſt Son) the Counteſs was *found to have right, to Lyfrent theſe Lands tho' never in the Perſon of the Father*, The like

Where a Right originally acquired in the name of a ſecond Son, was alſo affected by the Relicts lyfrent, upon a clauſe of Conqueſt. 5o The *Deciſions* adduced in the Caſe of Children provided to Conqueſce, import nothing; becauſe all Children doe repreſent the Defunct, in ſo far as they have benefite by him; whereas the Relicts are moſt favourable Creditors, and the *Deciſions* adduced in the caſe of Relicts are of no moment, as that Lands conqueſced, or burdened with the Debts due expreſly for the purchaſe thereof, nothing being reckoned but with deduction of Debts during the Marriage. And in the caſe of the Lady *Dumfermling* againſt her Son 26. *November*. 1629. Where the Superiour having acquired the property of *Fews*, and having again fewed the ſame Land for greater *Few duties*, Theſe additional *Few duties* were not reckoned Conqueſce, Becauſe the Right of the *Fews* came to the Huſband by Vertue of Irritancies contained in the Fewars Charters, incurred before the Marriage, and whereby no duty out of theſe Lands could be reckoned Conqueſce during the Marriage. 6. The Purſuer did not reſt in a ſingle clauſe of *Conqueſce* to which all the *Deciſions* did relate, but did farther provide for her

to imploy all *Sums during the* Marriage, which muſt at leaſt oblige the Defunct in ſo far as he and his Heires were *Lucrati* by imploying theſe ſums for the relieſe of his Eſtate, which clauſe muſt either have that import, or none at all; For no body can imagine that the Purſuer would conſider that uncertain claim upon *Huntlies* Eſtate to be of any value, and if nothing elſe had been conſidered, that would have been particularly expreſt: and it was moſt rational that the Defunct ſhould grant ſuch an obligement, Becauſe my Lady by the conveyance of her Joynture did ſecure 36. *Chalders* Victual for the maintenance of the Family, which being ſufficient for maintenance, and all neceſſary expenees, it was moſt Juſt that what other ſums might be received by the Defunct, ſhould be imployed for the Ladies lyfrent uſe, yet notwithſtanding of the ſetlement at the Contract, It is offered to be proven that my Lord by himſelf did intromet with 24. Chalders of the victual allocat for the entertainment of the Family, by which means my Lady was neceſſitat to take up her Joynture in the *North*, which ſhe had diſponed to her Children at the time of the Contract, and to conſume the ſame for the Intertainment of the Defuncts Family. So that it cannot be thought an invidious claim, that my Lady ſhould deſire her lyfrent, equivalent to the debts payed by that part of the Joynture, which was allocat to the intertainement of the Family.

It was duplied, that all the pretences inſiſted upon Joyntly or ſeparatly have no ſhaddow of relevancy in them, and 1*ſt*, As to the firſt Alledgance *viz.* That the Purſuer inſiſts only for a lyfrent of what is extant Conqueſce during the Marriage, by relieving the Eſtate that was overburdened, and thereby was *Locupletior factus*. It is anſwered, that as the lybel could not relevantly conclude the imployment of all ſums purchaſed and received during the Marriage, but with the burden of all rational Deeds. So neither can it be ſuſtained, as it is now reſtricted, for the lyfrent of the Lands relieved, and *in quantum* the Defunct was *Lucratus*; becauſe Law doth allow all Husbands a

free

of Conqueſce for what is conſumed by that adminiſtration, and as they might have waſted, and ſpent all unprofitably, ſo much more might they apply the ſame for payment of debts, which is not only a rational but a neceſſary deed, and if the Creditors had not found the Defunct ſo juſt in his Inclinations, they would have compelled him thereto, either by perſonal diligence, or by affecting his Eſtate; and the pretence of *Locupletior factus* imports nothing, unleſs the Purſuer could ſubſume in the terms of the obligment that the Defunct had been *Locupletior factus* in Lands, Heretages, or ſums of Money, which here cannot be alledged; for the Defunct was only *Locupletior factus*, by payment of his urgent Debts, which is neither a fraudulent adminiſtration, nor was he thereby enriched in the *Particulars* enumerat in the clauſe of Conqueſce; and conſequently my Lady has no Intereſt in that gain: for clauſes of Conqueſce are ſtrictly interpret, and never extended beyond the preciſe Words; therfore a wife having right to Conqueſce of Lands, hath no right to ſums acquired, and ſhe who has right to Lands and ſums, has no right to Victual, Pleniſhing, Plate, Jewels, or moveables of any ſort, So that if the Defunct at his deceaſe had been worth 10000 pounds Sterling, in other moveables than ſums of Money, the Purſuer could not have acclaimed any intereſt therein, which may ſatisfy the *Lords* that there was not ſuch an anxious concetne to make this Conqueſce ſecure, when Goods and Geir and all moveables were omitted in the Clauſe, which are oft provided as Conqueſce, and as the Defunct had power to have turned all his free Eſtate in ſuch moveables, ſo much more could he pay his urgent Debts, and releive his ancient Eſtate, without providing the ſame to his Lady, and the Children of his ſecond Marriage, to the excluſion of his legal Heirs, 2. The releiving of the Lands of *Collingtoun*, cannot in Law be reckoned a Conqueſce of theſe Lands, becauſe a Conqueſce Is a new *few* to which the Defunct neither did, nor could ſucceed, as Heire to any of his Predeceſſors: and the Defender de-

desires that the Pursuer would condescend upon any former practick, where ever a Wife or Heirs of provision did pretend that a *Husband*, or *Father*, could not pay his Debts in prejudice of a Conquesce; so that if there be little decided in this, it is because few or none have ever pretended to call it in Question; on the contrary all that is found to approach to this Case, is a debate betwixt the Countess of *Dumfermling* and her Son 26. *November*. 1629. And *Fraser* contra *Fraser* lately decided. By the first of which *Decisions*, the Lords found "*That the Earl of* Dumfermling *having acquired the right of property of* "*certain Fews during the* Marriage *which he fewed out again* "*for greater few duties, that the* Countess *had no interest in* "*these additional* Few *duties by the clause of* Conquesce. And whereas it is pretended that the ground of this *Decision* was, because the *Fews* were declared Null, upon irritancies before the Marriage, this alledgance, is *gratis dictum* and without the least vestige of reason from the *Decision*, which was upon just grounds; because the *Earl* having a *Dominium Directum*, any improvement of that *Dominium* during the Marriage was not regarded as a Conquesce. And the Lords had formerly great regard to this *Decision*, in the case of the Laird of *Niddrie* against his Brother; where the Father having a right upon the Lands of *Lochtoure* preceeding the second Marriage, albeit the same would have been ineffectual in competition with Rights acquired during the second Marriage, yet the Lords found, *that the posterior rights were presumed to have been acquired for validating and compleating the anterior* Right, *and that they did accresce thereto, and the Son of the second Marriage had no in-Interest therein as* Conquesce And in the case of *Fraser* and *Fraser*, the Husband at his Contract did put a valuation upon the Estate he had over and above certaine Ackers of Land, which he declared should not be estimate any part of the Conquesce, yet the Relict having acclaimed a lyfrent of the Conquesce during the Marriage, the following points were therein decided *viz.* 1 That the Father having immediatly after the second Contract provided 6000 *Merks*, to his eldest Son,

beside the forsaid capital of 11000 *pounds*, and his Daughter to 5000. *Merks*, and allowed 1000 *pounds* for her Wedding Cloaths, and having payed a great part of these sums very shortly after the Contract, before it was possible to have acquired so much money as could have payed the same, yet the Lords found, *that these sums so contracted, and payed, were not to be taken off the capital of* 11000 pound *of his Estate before the Marriage, but the whole capital foresaid behoved to be deduced before reckoning the Conquesce at the Dissolution* 2. In that case, they found that *all Debts were to be deduced, both those that were prior, and those that were posterior to the Marriage*; as appears by the debate immediatly preceeding the Interloquitor, which was done upon deliberation by the whole Lords, and thereafter represented of new by two several Bills, containing the whole favourable circumstances of the Case, and particularly that the Relict had but a very mean provision besides the Conquesce, upon which she could not live; all which appears by the forsaid Decreet, marked at the several debates and interloquitors; and what is now pretended is far less favourable then any of these Cases.

To the second alledging, that *Conquesce* is alwayes understood, in sua far as the Husband was richer at the *Dissolution* then at the *Contract* of Matriage. It is answered that the grounds abovementioned doe fully satisfy this pretence, for the estimation of the Husbands being *Richer*, must be made with relation to these particulars whereof the Contract is provided to the Wife; and if the Husband have provided a Wife to lyfrent the Conquest, Lands, and Heretages only; it is not to be considered how far the *Husband* is become *Richer* in sums of Money, Goods and Geir, whereof, the *Wife* hath no clause of Conquesce, or if the provision of Conquesce be of Lands, Heretages, and sums of Money, as in this case, tho' the Husband had purchased a great Estate in Jewels, Plate, Victual, Cattel, or any moveables, that is not to be considered but only how far he is become richer in Lands, Heretages, and sums Conquest which is not pretended in this Case but only that

he

he is richer by payment of his Debts, and reliving of his Lands. And seing my Lady did not take my Lord oblidged to imploy all Goods, Geir, and movables whatsomever, it is a demonstration that she did not intend to tie him so closs as is now pretended, but left to his own discretion whether he would enrich himself in these particulars provided for her lifrent-use, or in others wherein she had no interest.

To the third, it is admired that the Lady should recur to *Decisions* to fortify her pretence, for in all the *Decisions* for above sixty years there is no variation, except in that pretended *Decision* adduced be the Pursuer *Skeen* contra *Robertson*, which has nor been seen by the Defender not being in *Durie* nor any citted known Writter, and whereof the circumstances doe not appear, and all others doe agree in this, *that a Husband, or Father, may not only do all onerous Deeds, but may give Liberalities and Gratuities even to Children, or to the Heir where there is a rational Cause, much more may urgent Debts be payed, whereto the Acquirer could be compelled.*

And as to the only defence against all the *Decisions*, upon the singularity, *that the Pursuer had no special provision, and that by the advice of an eminent* Lawyer. *It was thought fitter to take these general Clauses, then a provision of* 3000 Merks *yearly*, It is answered, this speciality makes no alteration, it being impossible to find different Cases, so perfectly agreing, but some circumstances will vary. but here the rule of the Lords *Decisions* is, that all rational Deeds shall be sustained, and if this be such a circumstance, that it renders the payment of the Debt in prejudice of the Conquesce, fraudulent, then it is relevant but not otherways, and still there is to be a difference wade betwixt first and second Contracts of Marriage, for if a man in his first Contract of Marriage gave no special provision, but a clause of Conquesce, whereby if the Husband should voluntarly evacuat the Conquesce, the Wife of his youth, and Mother of his Children would become destitute and miserable, It were infamous in him to evacuate such a *Conquesce*, except by inevitable Deeds; and any voluntary Deed would in Justice

be reckoned fraudulent; but in a second Contract where there is no portion, but a joynture that returns at dissolution, the like favour is not due. For if the Relict have an honourable provision, whether by the first or second Marriage, it imports not, yea there is nothing more ordinary then that Heiresses do content themselves with the lifrent of their own Heretages, and oft times with less, yet in the case *Robertson* against *Robertson* 15th *July* 1673. It is plead for the Relict who was Wife of the first Marriage, that she had only an clause of Conquesce, and no special provision, yet a bond originally taken in the name of the eldest Son during the Marriage, was sustained against her, unless there were not sufficient means for a competency to her *Aliunde*, in which case the Lords found, *the bond would be fraudulent*; and there is no question the Lady was very well advised in relation to these Cases she desired advice in, as how to convoy her Joynture, which was done to so good effect, that the Defunct with all the Influence and right of a Husband, could never come to one sixpence of the *North-Countrey* Joynture; but these Clauses were never advised by a Lawyer to have any special effect, whereof the Lords may be satisfied by the Pursuers own Assertion, that 3000 Merks of Joynture was offered; and was there ever any Lawyer that would prefer a general Clause of Conquesce to a special Provision, which has a preference as to Moveables, to all Creditors, and is usually the best secured real Debt; so that the neglecting of a special Provision, is a demonstration that there was no Liferent under prospect, and that the Clause of Conquesce was adjected of meer Stile and Formality. And Sir *Andrew Gilmour* who drew the Contract, would never have agreed to so unreasonable Clauses as these in the Contract are, according to the Pursners Interpretation, he being the Defuncts Brorher in Law.

To the Fourth, There was nothing ever decided contrary to what is now pleaded: for the Decision finding, *That the Wife had Right to the value of a Fishing in* Aberdeen *which by the custom of the place could not be bruiked by a Woman*, was most

like the Earl of *Dumfermling* Acquiring Lands in the Name of his eldeſt Son, was juſtly found, *To have done a fraudulent Deed to evacuate the Conqueſce*, Yet betwixt the ſame Parties, it was alſo found, *That the Earl having firſt acquired a profitable Tack of the ſame Lands during the Marriage, and afterwards having acquired the property, the Ladies Lyferent of the Lands extended no farther, than to the Tack-Duty contained in the Tack firſt acquired*; On this ground, that the Lady was not provided to the Lyferent of Tacks, albeit it might have ſeemed that the Tack was extinguiſhed by the Property: But ſtill the Lords do reſtrict theſe Clauſes as much as they can bear.

As to the Fifth, Pretending to Anſwer the *Deciſions* adduced, it is anſwered, That the *Deciſions* in caſe of Heirs of Conqueſce, do by much more ſtrong reaſon cut off the concluſion of this Purſuers proceſs. For Heirs of Conqueſce, are more favourable in relation to Conqueſce than Relicts; as was expreſly found in the Caſe of the Lady *Kilbocbo*, againſt the *Laird*; and Lady *Rentoune* againſt the *Laird*, where Lands Conqueſt were burdened with annual-rents of a part of the price reſting, albeit in both the Lords declared they would have found otherwiſe in the Caſe of Heirs of Conqueſce, ſo that Heirs of Conqueſce being more favourable than Relicts, what ever doth exclude their Intereſt in Conqueſce, muſt much more exclude the Relicts Intereſt, and the pretence that Heirs of Conqueſce do repreſent the Defunct, whereas Relicts are Creditors, is of no moment, becauſe in competition with Creditors, they are conſidered as Heirs, but in reſpect of the Heirs of Lyne (which is the Caſe of all the *Deciſions*) they are moſt favourable Creditors.

To the Sixth, Founding upon the laſt Clauſe of the Contract anent *ſums due during the Marriage*, alledged to be inſert for a farther Security than the common Clauſe of Conqueſce, which varies this Caſe from all theſe beſide it. It is anſwered, The Defender hopes he has already ſufficiently

cleared,

cleared, that by the construction of the words in the Contract, nothing is comprehended that *fell due after the Marriage*. *Et separatim*, it is hoped that the Reasons already adduced, why the import of that Clause (as the Pursuer would have it) signifies no more than a common Clause of *Conquesce*, and consequently must be subject to the saids burdens, and be concluded with the same *Decisions*, and the force of what hath been said, is the more evident, that the Pursuer found her self obliged to recede from the first conclusion of the *Summonds*, for *Imploying all sums due, and received, without exception*, and did restrict the same to the sums imployed for the *Payment of Debt*, and *in quantum Lucratus*; whereby it is evident that Law does not sustain such an Obligment to imploy *All sums received* in the full Latitude of the Clause. And if it cannot be effectual as it stands in the Style of words, we must then consider what is the Cause, why Law restricts the effect of such Obligments, and we shall find the Cause to be the same why Law restricts the effect of *Conquesce*, as being against the Interest and meaning of Parties, the rights of Property and Commerce, and that such Clauses are only *Destinations*. Again, if we consider the Syle of both Clauses; Clauses of *Conquesce* are as peremptor to imploy *all sums Conquesced*, as this is alledged to be for *sums during the Marriage*. And seing the last Clause cannot be effectual in the full Latitude more than the first, what other estimate can be made thereof, than the known Marches and Land Marks, by which the *Lords* have bounded the effect of *Conquesce*. And as clauses of Conquesce do easily run in relation to sums purchased and acquired; so suppose a clause of Conquesce should run in these Terms, *All sums Purchased, Acquired and received during the Marriage*; can it be supposed that the word (*Received*) should make an alteration in the Case; or are not sums *Acquired* during the Marriage, *Purchased?* And are not sums *Purchased, Received* during the Marriage? So the terms being Convertible, they cannot vary the Decision. 2. *Et separatim*, tho' it had been the expres meaning of Parties, to have obliged

the

the Defunct to *Imply an sums to be Received by him*; yet such an Obligation could not have been effectual in Law: Because a Husband by his *Jus Mariti* hath right to all moveable sums falling under *Communion of Goods*: And farther his right thereto is unaccountable, and the *Jus mariti* of an Husband, it is so fixed and insured by Law, that *inhærit Ossibus*, and cannot possibly be renounced in favours of the Wife, by any deed of the Husbands directly nor indirectly: Whereas by this clause as it is interpreted, the Husband should be effectually denuded of his *Jus mariti* in favours of his Wife, in so far as he would thereby be accountable to his Wife for her lyfrent-use, for his intromission with *moveable sums*, which in Law do belong to him unaccountably. And as it is not controverted that the *Jus Mariti* doth imply an unaccountable right in the Person of the Husband, so it hath been found on most Just grounds that this right is incommunicable to the Wife, in the case of the Lady *Pilton* against *Hay* of *Balhousie* 2d. *February*. 1667. Where a bond of 1000. *Merks* yearly being granted to a Wife to be disposed of as she pleased, secluding the Husbands *Jus Mariti*; The Lords found that *payment made to the Husband, without the Wifs consent, did exoner the Debitor, and exclude the Wifs executors*: Which clears that a right could not be so qualified, but that it behoved to be Simply transmitted to the Husband, or null. But for farther evidence, that even the *deed of the Husband himself cannot divest him of his Right*, It was found 13, *July* 1678 that a *Husband having renounced his* Jus mariti *to a part of his Wifes Joynture in favours of his Wyfe, the right thereof did return to the Husband, albeit he suffered his Wife to possess the renunced Lands all her life time, yet the extant product of these Lands did belong to him, and that he himself could not be excluded by the personal objection of his own Renounciation*, The like was found in the case of *Hamilton* against the Lady *Carberry*. And, if the Husband could not by a *Direct deed* renounce the *unaccounntable management*, much less can he do it by a *general and separate* Clause, which would in consequence import a renounciation

ciation thereof to his Wife, for the *Jus mariti*, consists not only in the *Management*, but it must be *unaccountable*.

3, *Et Separatim*, the Defender cannot be lyable *In quantum Lucratus*, upon this Clause, tho' it could be effectual in Law, unless it were subsumed and offered to be proven, that he was *Lucratus*, *by applying sums of money received during the Marriage to the payment of his Debts*. For albeit it were instructed that the Defunct did receive considerable sums of Money, and also that he payed considerable sums due by him, yet that could not infer that these debts were payed by sums of Money received during the Marriage, seing the Defunct had *another Subject* than *Sums of Money*, out of which he could have payed his Debts *viz.* 24. *Chalders* of *Victual* yearly as a part of the Pursuers Joynture, which in the debate is acknowledged to have been allocat for the Defuncts free disposal at his pleasure. Suppose then that the Defunct had consumed his Sallaries, and Pensions, upon the charges and expenses of his Family, or upon orher reasonable and creditable occasions (as it is acknowledged he might have done freely and unaccountably) and that he were *Lucratus* by applying the saids 24. *Chalders* of Victual for the payment of his Debt; he could not be said to be *Lucratus* by *sums* of Money, but only by Bolls of Victual, for which, by the clause he is not accountable; and if the Pursuer will assert that he is *Lucratus* by *sums* of Money *Afferenti incumbit probatio*. And farther he had other subjects out of which payments might be made, *viz.* The Lands of *Collingtoun* which were stocked, as also he sold 100000. *Merks* worth of *Lands*, and there is nothing more ordinary, than for overburdened Heritours to obtaine great eases, when they have ready money to pay, whereby the said 100000. *Merks* may have payed 100000 *pounds* of debt, So that my Lady cannot be exonered upon a *presumptive*, but must adduce a positive probation, that my Lord was *Lucratus by sums of* Money.

4 The Pursuer must not only prove, that the Defunct was once *Lucratus by payment of his Debt*, but that the said *Lucrum did remaine with him, till the dissolution of the Mar-*

riage

upon a just and reasonable cause, dispose of his *releived Lands* to his eldest Son by Contract of Marriage, as is alledg'd, the Pursuer cannot claim any interest in that purchas; But it appears evidently by the Contract, that the Defender was then designed to suceced to his Father in these *Lands*, in so far as the very Clause upon which the Pursuer founds her *conquesce to be provided to her in lyfrent, and the Bairns of the Marriage in fee, which failing to the* Defuncts *other* Heirs *appointed to succeed him, in his other Lands and Estate*; whereby it appears, that as the Defender was the lineal Legal Successor of his Father, the Pursuer did not then envy his succession to the Estate of *Collingtoun*, which by her own clause of *Conquesce*, is designed *his other Lands* and *Estate*; so that the Lands of *Collingtoun* can never be reckoned Conquesce; nor can the Pursuer quarel the convoying the right therof to the Defender, seing by her own Contract, it is declared that his *present Lands and Estate not contracted was designed to descend to his Lineal Heirs* which could not be, unless it had been also Lawful to purge the same of Debts, being then burdened above the value, and as it was arbitrary to the Defunct not to have made any *Purchase*, so he might justly dispose of it: But that the Lords may be satisfyed how Calumnious, and groundless this great noise of *Purchase* is, they would be informed, that the Defender being Married in *Anno.* 1670. Within a few years after the Contract, it was not possible the Defunct could make any purchase before the Defenders Marriage; Because all the Subject of his Estate was my Ladies Joynture of 36. *Chalders* of Victual, 200 *pounds* Sterling of Sallary, and the Lands of *Collingtoun* not then exceeding 3000 *Merks*; out of this, he had all the necessary charges of his Family, Servants, Coach, and Horses to lay out, and the Defender to intertain in his travels, and the Annual-rent of his weighty debt to pay, after which deductions there will remaine no place for Conquesce: And after the Defender was Married, he lived in that intire Confidence with his Father, that all the portion he received, which was known to

his Father to him, was as much poſſeſt and enjoyed by his Father as by himſelfe, never having heard of this pretence of *Conqueſce*, and looking upon his Fathers intereſt and his own, as the ſame, many ſums affecting the Eſtate were payed by him without ſo much as mention from whom the money was received, and there were no Aſſignations taken to any Debt, but alwayes Renounciations and Diſcharges; ſo that if this Covetous pretence ſhould hold foot, my *Lady* ſhould lytrent the Defenders portion, which was four times greater then the Conqueſce, it being impoſſible to diſtinguiſh the one from the other.

In reſpect whereof, the *Lords*, are humbly intreated to give diſtinct interloquitors upon the ſeveral grounds abovementioned, and particularly, 1 Anent the *Extent* and *Import* of the clauſe of *Conqueſce* 2 Anent the *Import* of the ſecond clauſe, if it does relate to ſums *due* or *falling due* after the Marriage. 3 If the ſame could be of any greater force than a clauſe of *Conqueſce* tho' it did relate to ſums due *after* the Marriage. 4 If by ſuch a conſtruction the ſecond clauſe would not be equivalent to a *Renounciation* of the *Jus mariti*, as to theſe ſums in favours of the Wife, and if ſuch a *Renounciation* can conſiſt with *Law* and former *Deciſions*. 5 If the Purſuers probation of the payment of Debts, and the receiving of ſums of Money, could infer a ſufficient *evidente* that theſe Debts were payed by the ſums of Money, ſeing there were other *Subjects* out of which the Debts might have been payed. 6 If the Defunct can be reckoned *Lucratus*, ſeing he did not *Die in the fee* of theſe Lands received, but was denuded thereof upon a moſt juſt and rational account, *ſine fraude*, which are all diſtinct grounds ſeparatly propoued.

A.

A List of the Decisions *related to in the Lord* Collingtoun's *Information, against the Lady* Castle-haven.

THat the Husband hath the absolute Administration and Managment of all Rents, Annual-rents, and other Moveables, belonging to his Wife during the Marriage; notwithstanding any Renounciation of his *Jus Mariti* thereto, in Favours of the Wife, is evident from these following Decisions, *viz.*

The *Lords* found, that the Clause in my Lord *Collingtoun's* Contract, renouncing his *jus mariti* in favours of his Lady, did not debar my Lord from the management, and administration of the Rents destinate for maintenance of the Family; and that albeit the administration and management had been expressly renounced by him in the said Contract: The said renounciation had been *contra bonos mores*, and so void and null in Law; and that the Husbands administration being the Inherent Right and Priviledge of the Husband as such, was absolute and unaccountable, and could not be renounced in favours of the Wife. 9 *February* 1667. *Lady* Collingtoun *contra Lord* Collingtoun.

The *Lords* found, that a Wife having in her Contract of Matriage reserved a Power to dispose upon her Liferent without the Husbands consent, and the Husband having renounced his *jus mariti* to what was so reserved: The said renounciati did recurre and accress to the Husband himself by the Marriage; and after Decease of the Husband, allowed Compensation to the Heirs of the Husband, against the Wife and her Assigney, upon the account of the Wifes intromission *Stante Matrimonio*, with the Rents so reserved, and whereof the *jus mariti* was renounced, as said is. 13 July 1678. Nicolson *contra* Inglis.

The Laird of *Bathousie* having granted Bond to his Wifes Sister the Lady *Pilton* for 1000 Merks yearly, to be imployed by her for any use she pleased, without her Husbands consent, and secluding his *jus mariti*; The *Lords* found, payment made to the Husband sufficient to Assolzie from a pursute upon a 2 *February* 1667. *Executors of the Lady* Pilton *contra* Hay *of* Balhousie.

Bond, notwithstanding that by the Bond it fell, the Husbands *jus Maritt* was excluded.

A list of Decisions *anent the Import and extent of Clauses of Provision in Contracts of Marriage, conceived in Favours of Heirs of Conquesce and Provision, and Bairns of second Marriages; for clearing, that notwithstanding such Provisions, and Obligments, the Husband, or Father, hath the absolute Power and* Dominion *and unaccountable Administration of the Conquesce.*

9 February 1669. *Cowan contra Young.*

THe *Lords* found an gratuitous Bond granted by *Thomas Cowan*, to the Daughter of his first Marriage, long after his second Contract of Marriage, whereby he was obliged to provide all his subsequent Conquesce to the Heirs of that second Marriage, to affect his Conquesce during the said second Marriage: Notwithstanding that the Daughter of the first Marriage, to whom the gratuitous Bond was granted, was both foris-familiat, and *aliunde* sufficiently provided before that time; and it appears by the debate, that as a Husband might freely have gifted all his Conquest to Strangers, so he might likewayes gift rational proportions thereof to his Children of former Marriages, notwithstanding any such obligment in his second Contract.

26 June 1676, *Mitchel contra The Children of* Thomas Little-john

The *Lords* found, that the Obligments and Provisions for Conquesce in Contracts of Marriage, did not hinder the Contracters to dispone thereupon during their Lifetime: And that all reasonable Deeds, albeit they were done or granted, without equivalent onerous Causes, were effectual, notwithstanding of such Obligements and Provisions of Conquesce; and that the Children in whose favours the saids Obligements of Conquesce were conceived, could not be heard to quarrel the same.

19 June *Murray's contra Murray's.*

The *Lords* found, that rational Provisions to Children of a prior Marriage; could not be quarrelled upon the Clause of Conquesce in the Fathers second Contract of Marriage: And

here

7000 Merks granted to the eldeſt Son of the firſt Marriage: Notwithſtanding that the eldeſt Son, had ſucceeded to a conſiderable Land Eſtate by his Father: And in that *Deciſion* the *Lords* declared, that they would make the former *Deciſion*, *Mitchel, contra*, the Children of *Little-John*, a Rule for the future.

The *Lords* found that old *Niddry* having applied conſiderable ſums for acquiring in new and preferrable Rights of the Lands of *Lochtour*, and for purging and disburdening the Lands, of other Incumbrances and Debts: The ſums ſo expended during his ſecond Marriage could not be repute as ſums Conqueſt during that Marriage; in reſpect *Niddry* had a right to the ſaids Lands of *Lochtour*, ſtanding in his Perſon, before that time: And found that *James Wauchop* as Heir of the ſecond Marriage could have no Intereſt in the ſaids new acquired Rights, or for repetition of the ſums expended for acquiring the ſame, upon the Obligment in his Mothers Contract of Marriage, for providing all the Conqueſce to him: And this demonſtrates, that ſums expended for disburdening a mans *Prior* Heretage, of Debts and Incumbrances affecting the ſame, can never be repute *Conqueſce*, albeit thereby the Eſtate be nottourly meliorat and improven, and the yearly Rent coming in to the man augmented.

19 February 1683. *James Wauchop* contra Laird of *Niddrie*.

A Liſt of Deciſions *for clearing the import, and extent of Obligments and Proviſions of Conqueſt, conceived in Favours of Wives, as to their Liferents.*

The *Lords* found, that albeit the Husband was obliged to provide the haill ſums acquired during the Marriage, in favours of his Wife in Liferent; yet a Bond taken by a Husband payable to a Child of his former Marriage, did not fall under the Obligment of Conqueſce; and found, that Conqueſce was only to be underſtood of what was ſtanding in the perſon of the Husband, and undiſpoſed of, the time of his Deceaſe.

10 *February* 1629. *Oliphant* contra *Phinnie*.

The

The *Lords* found, that a Husband having, *Stante Matrimonio*, acquired the property of Lands, formerly holding of himself; and thereafter before his Decease, disponing the same to be likewayes holden of himself, for a double or triple *Few-Duty*; That neither the said Acquisition nor Improvement, by tripling the *Few-Duty*, did fall under the Obligment of Conquesce in the Wife's Contract of Marriage, albeit the same was acquired, and improven in her time; In respect the Earl had a Right to these Lands *Prior* to the Marriage, albeit the same was only a Right of Superiority.

26 November 1629. Lady *Dumfermling* contra Earl of *Dumfermling*.

The *Lords* found, that an obligement for providing the Wife to all the Conquesce, could not hinder the Father to grant provisions to his Children of a former Marriage, and even to the eldest Son and appear and Heir.

15 July 1673. *Robertson* contra *Robertson*.

Alexander Frazer having in his contract of Marriage with *Christian Frazer* his second Wife, provided her to a mean Provision of the annual rent of 3400 Merks, and to the lyfrent of the half of the Conquest that should be made during the Marriage, and having for preventing any debate anent the Conquest insert in the said contract, a particular inventar of his Estate, extending to 11000 pounds scots or thereby. It happened there was a considerable Conquesce of 15 or 16000 pounds, made during that Marriage, But *Alexander Frazer* the Husband, did exhaust and spend all the said conquesce by gratuitous Donations to his eldest Son and Daughter of the first Marriage, of 8000 pounds, Scots, and upwards, and did expend the sum of other 8000 pounds, or thereby, that was likwayes acquired during that Marriage, for payment of other Debts, for which he was engadged *Prior* to his said second Contract.

8 December 1687. *Frazer* contra *Frazer*.

Christian Frazer, having after the decease of the said Alexander, pursued his Heir, for the half of the foresaid Conquesce: and it being debated, whether the gratuitous donations to the Children of the first Marriage, and the sums payed out for Debts contracted and due by the Husband before his entring into the second contract of Marriage with the Pursuer, should affect the Estate belonging to the Husband before that Contract and

the saids gratuitous Donations and Debts sua payed, should be sustained to exhaust the Conquesce, in prejudice of the Relicts Lyfrent, who was so meanly provided. *The Lords found that the Heir of the Defunct, ought to have the* 11000 *pound to which the Fathers Estate was estimate in the said second Contract, allowed and made free to him, in the first place, and that the haill debts due by the* Husband *when he died, whether contracted before, or after the second contract of* Marriage, *ought to be payed, and affect the* Conquesce *in the Second place and that the Relict could only have right to the half of the superplus of the* Conquesce (if any was) *after the two Deductions above-written.*

It is observable, that albeit there were two Bills given in craving the said interloquitor to be rectified upon thir grounds, 1 That a considerable part of the 11000 pounds, to which the Husbands Estate was estimat, was exhausted by payment of Debts due before the second Contract, and 2 That the 4000 pounds gifted by the Defunct to his oun Heire of Line, who was obliged to *Implement* the Fathers obligment anent the Wifes lyfrent, might at least be sustained as Conquesce. *Both bills were refused, and the first interloquitor adhered to;* So that the Husbands Estate which was once for the most part exhausted by the foresaid gratuitous Donations, and antecedent Debts, as said is, immediately after the second Marriage, and before any Conquesce could be made, was Sustained to be made up, to the Heir out of the Subsequent Conquesce, without allowing the Relict her lyfrent of the equal half thereof, conform to the obligments of the Contract, albeit her other provisions were so mean and inconsiderable, And the principal decreet is produced marked with several letters of the Alphabet, directing to the grounds therein pleaded, and determined and herein repeated, and the forsaid *Decision* was so solemn, that the *Lords* declared to the Procurators on both sides Judicialy, that they would observe the said *Decision* in all such cases thereafter.

The

ber 1665. Laird of Kilbocho contra Lady Kilbocho.

The Lords found, that a Wife was bonged to pay the annual-rents of the price of Conqueſt Lands, notwithſtanding that ſhe was provided Simply and abſolutly to the Conqueſce, and that the Heir was ſufficiently able to have payed the ſame. And by this *Deciſion*, as alſo by an other *Deciſion* betwixt the Earls of *Dumfermling* and *Callendar*, The Practick alledged upon by the Purſuer in the caſe of the Counteſs of *Dumfermling* in *Anno.* 1625 is fully anſwered, and elided.

THE

INTERLOQUITOR,

Edinburgh 29 *January* 1690.

THe *Lords* having adviſed the debate, *Finds*, that the *clauſe of Conqueſce* lybelled, did not hinder the deceaſed Lord *Collingtoun* to ſpend his yearly revenue as he thoughr fit. And *find*, that the Lady, be vertue of the clauſes in the Contract; has right to the *Ly*ſrent of all ſums, which belonged to him the time of his entering into the ſecond Marriage, or the time of his deceaſe. But they *find*, that albeit it were cleare that he had releived his *old Lands* and *Eſtate*, of Debts, which affected the ſame, the time of his entering into the ſecond Marrriage, by ſums acquired during the ſecond Marriage; Yet that the Lady by no clauſe in the contract, has any right to purſue for the lyſrent of the Lands releived by ſuch ſums. And that the Lord *Collingtoun* might have imployed the ſums ſo acquired; for relieving his Eſtate of Debts affecting the ſame the time of entering into his ſecond Marriage, Notwithſtanding of any clauſe in the Contract.

Sic Subſcribitur

JAMES DALRYMPLE. I.P.D.

The

I Dame *Margaret Areskine* Lady *Caſtle haven*, Conſidering that in the Proceſs purſued at my Inſtance before the Lords of Seſſion, againſt Sir *James Foulis* now of *Collingtoun:* The ſaids Lords be their Interloquitor bearing date the 29 of *January* inſtant, Found that the *Clauſe of Conqueſce* Lybelled, did not hinder the Deceaſt Lord *Collingtoun* to ſpend his yearly Revenue as he thought fit: And found that the Lady be vertue of the Clauſes in the Contract, has right to the Liferent of all ſums which belonged to him the time of his entering into the ſecond Marriage, or the time of his Deceaſe: But they found, that albeit it were clear that he had reliev'd his *old Lands*, and *Eſtate*, of Debts which affected the ſame the time of his entring into the ſecond Marriage, by ſums acquired during the ſecond Marriage; yet that the Lady by no Clauſe in the Contract has any Right to purſue for the Liferent of the *Lands relieved* by ſuch ſums; and that the Lord *Collingtoun* might have imployed the ſums ſo acquited, for relieving his Eſtate of Debts affecting the ſame, the time of entering into his ſecond Marriage, notwithſtanding of any clauſe in the Contract: By which Interloquitor I conceive my ſelf prejudged; and that by the *Claim of Right* it is provided, That any perſon ſo prejudged, may appeal for *remeed of Law* to an higher Judicature, I do therefore by thir preſents, Appeal and proteſt from the ſaids *Lords of Seſſion*, to the *High Court of Parliament* for remeed of Law as ſaid is, and intreats your Lordſhips to ſtop the ſaid *Interloquitor* till it be heard in Parliament *Sic ſubſcribitur*

M. Areskine,

Unto His Grace His Majesties high *Commissioner*, And to the Right Honourable the *Nobles*, and *Barrons*, and *Burgesses*, Assembled in *Parliament*.

Dame Margaret Areskine, *Lady* Castle-haven:

HUMBLY SHEWETH,

THat the late Sir *James Foulis* of *Collingtoun* having long sought your Petitioner in Marriage, did offer his House and Yards, and 3000: Merks be Year, to me in Jointure: Which he confest was all he had. Your Petitioner having at last consented to Marry, but did refuse to take the 3000 Merks: Since it was cleare that his Children in his first Marriage by his first Lady, should then want altogether; Yet he said, though they should want he would secure me in that. But when I told him, I would not deale so with his Children, but Condescended to accept of his House and Yards, and the Life rent of all Sums of Money, Bands, or Heretage, which he should Conquess or acquire, and of all sums of Money due to him, which he shall happen to receive during the said Marriage. And he obliges himself to Employ the same, and take the Rights thereof to himself and Your Petitioner, the longest liver of us two in Life-rent: Of this he was so well pleased, that he desired it might be secured as my Lawyers should desire, which was accordingly done in as expres Terms as they thought possible, upon this Marriage following. And what ever provision was made in the Petitioners Favours, in that Contract, as to my own former Estate: Yet he possessed and employed a considerable part of my Estate, to entertaine his Sons Family, and to pay his former Debt. After his Decease, your Petitioner little doubted of the Possession of what was so fairly Contracted; But being forced to Suit it before the now Lords of Session. They by their *Interloquitor* of the 29th of *January* last, Did Find, *That the clause of the Contract did not hinder the Lord* Colling

lingtoun *to Employ all the Sums he should be acquired during the second Marriage for payment of the Debt, before he entered in the second Marriage.* Though this be expresly contrary to the Tenour and Faith of the second Contract, by which he is expresly bound to Employ all Sums he should Acquire, so as your Petitioner might Life-rent them. But least the *Iniquity* designed should not be cleare enough, since no clause in the Contract could prejudge his Creditors, or hinder them to affect these new Acquired Sums. The saids Lords by another Clause declared that if he Employed his Money to pay his Debt, and so to relieve Lands formerly morgaged by him to Creditors yet that your Petitioner by no means could pretend to the Rent of these Lands so redeemed by the Money, which by the Faith of the Contract, was destinate for your Petitioner; by which *strange Sentence* all Faith of Contracts is violated, and Law which should protect Widdows is wrested, to their Ruine and Fraud, and indirect Dealings is not only Encouraged, but owned to be the Design of the Law; for whatever might be pretended for employing the Money acquired during the Marriage, for releiving his morgadged Estate, yet what can colour the Fraud and Iniquitie of employing it so contrary to the Tenour and expres Faith of the Contract, and the Equity of the Conveyance, as to force the profite of that Money to descend on the Lord *Collingtoun*'s Son, in Defraud of his Wife, by whom he profited considerably, and Consequently was as onerous, and Just a Creditor, as he had or could have. This being so clearly to Impugne Law, Equity, Justice, and Honesty, that none who knew the late Lord *Collingtoun*, thinks he designed so foul a Fraud; nor could ever such an Interpretation of this Contract fall under the Prospect of so Honest a Man. Albeit your Petitioners Lawyers did fully Redargue all these Quibbles, which my Opposites Propond, and that all Lawyers who were not Blinded with Personal concern, doe look on this Sentence alike opposite to Law, as to Equity, and the Interest of Mankind: Yet no Addres to the greatest part of these Judges would procure Redres or Delay to your

Petitioner, whereupon I was permitted (though with Difficulty) to appeal to His Majesty, and his Parliament as the last Result and great Sanctuary of the Injured, and Oppress: That your Grace, and Lordships, who sits in the highest Capacity of Law, should have Occasion to Vindicate the Kings Laws from the staine of being a covering for Fraud, on Subtil, or Wrested Notions. And to shew the Nation that Faith, Truth, and Honesty, are what Law is appointed to Sustaine, and to let the People find the Judgement of the Nation, can discern Equity from Fraud, and is the best and last Refuge to the Injured; Your Petitioners Appeal in this Matter being given in the 31 *January* last, it could not procure so much as Delay, but Decreet was given out,

MAY IT THEREFORE PLEASE YOUR GRACE, and Lordships, *to grant warrand to* Cite *the* Lord Collingtoun, *or any others ye shall think fit, to* Compeare *before Your* GRACE *and* Lordships, *on* 24 Houres *Warning, he being a Member of your Meeting; and to call for the process, and* Appeal, *and to Judge therein as seems Good and Just: And in this small* Case, *to shew the Nation, what safety they have in their own Representatives, when called by His Majesties Sacred* Authority, *and what differences there is by* Judging *according to Equity, and express meaning of Parties, and* Judging *by Unthought of Subtilties. And* Humbly BEGGS, *That the* Tenour *of the* Contract *be considered in the plain* Sense, *and just effect; And Decern the* Lord Collingtoun *to pay the Petitioner, the Interest of what Money his Father received during the Marriage, belonging to him, and that for all Years since his* Fathers Death, *and in time coming, during the Petitioners Life; And to remit to the* Lords of Session *to receive what probation Your* Petitioner *shall adduce, for proving what Money his* Father *did receive belonging to him during the Marriage, and that they may give therein Decreet accordingly, And Your Petitioner shall ever Pray, &c.*

IF the Members of Parliament, or any other perſons ſhall be pleaſed to peruſe the above-written Proceſs; they may have a much ſurer ground to found their Judgment and Determination upon, in this Caſe, (which is important to the Parties, but more in the preparative to the Kingdom) Than to rely upon the bare aſſertion of either Party.

It is no new thing that Parties ſhould be perſwaded of the Iniquity of any Sentence, which cuts them off, from their Hopes and Expectations; and that Complaints and Murmurings ſhould ariſe upon theſe Sentences, which alwayes were, and may be expected; and therefore, it was ever the care of our Law-givers, that neither the Judicatures, nor the Perſons of our Judges ſhould be Vilified or Contemned, ſeing they Repreſent the Kings Perſon, in the Adminiſtration of Juſtice: Nor that the Judges ſhould be allowed to abuſe the Authority that is committed to them, by doing Wrong or Unhoneſty. Therefore ſhortly after the Inſtitution of the Colledge of Juſtice, it is provided by the 68 Act. 5 Parl. *Ja.* 5. *That the Lords of Seſſion ſhould be had in ſpecial Honour, and that no Credit be had to any that Murmur againſt them: But they ſhall be called before the King, and if they be found Culpable, they ſhall be puniſhed after the quality of their fault; and if they be found Clean and Innocent; the Perſon complaining ſhall be puniſhed with rigour, and never have Credit with the King again.* This Statute and all others, in relation to the Seſſion are yet ſtanding Laws, and are ſutable and agreable to that Article in the Inſtrument of Government. *Whereby it is provided, That it is the Right and Priviledge of the Subject, to proteſt for remeed of Law to the King and Parliament, againſt Sentences pronounced by the Lords of Seſſion.* Which doth not Authorize every Proteſtation at the pleaſure of the Party; but only in theſe Caſes, wherein Murmurs and Complaints were allowed by our Antient Laws: And if ſuch Proteſtarions be now found Injurious, the Party proteſting,

testing, is punishable by the former standing Law, against unjust Murmurers and Complainers.

No Protestation for remeed of Law having formerly occurred since the *Claime of Right*, it is of the greatest importancy, that the extent and meaning of the said Article of the *Meeting of Estates* be carefully and narrowly considered, that no practice follow upon it, which might tend to render the property and possession of the Subject more Doubtful, Disquiet, and Unsecure, than formerly, contrary to the cleare designe thereof; By which it was intended, *That an important right and priviledge of the Subject should be asserted and declared.*

In the first place then, the foresaid Declaration does not Warrant, nor Authorize Appeals, but only Protestations for remeed of Law. On the contrary, the same doth clearly Import a Prohibition of Appeals, by the last Provision thereof, *That such Protestations shall not stop the Execution of the Sentences of the Lords.* Which is equivalent, as if the *Meeting* of *Estates* had expresly discharged Appeals, seing the plain Import of an Appeal, is to suspend all effect of the Decision or Interloquitor of that Judge, from whom the party Appeals; yet the Lady thought fit to present a Paper, Appealing from the Lords: And in her Petition, she doth not design the Paper presented by her *a Protestation*, but an *Appeal*, which is repeated in three several places of that Petition: Notwithstanding Appeals be expresly prohibited. and the Lords of Session Impowered, *To decide utterly in civil Causes pursued before them, without remeed of Appellation to King and Parliament*, by the 62 *Act.* 14 *Parl.* King *Jam.* 2. And the 39 *Act.* 5. *Parl. Ja* 5. And which Acts were not Intended to be Abrogate or Rescinded by any Article in the Claim of Right.

2 It cannot be imagined that the *Meeting of Estates*, did intend that a party might freely protest for remeed of Law in every cause, without any hazard or inconvenience, In case that Protestation were found not to proceed on just grounds, for the said Article being no constitution of any new Right not formerly competent to the Subjects, But an assertion and declaration

be measured by our ancient Laws, which did allow murmurings and complaints upon just grounds; in the same cases Protestations are allowed by that Article, as if the Lords should refuse to Minister Justice, or if they should not only be Judges, but Solisters, partial Counsellers, Assisters and Partakers with some of the parties, and to take Geir and Profite; in these cases, as Murmurs and Complaints were Lawful be the 26. act 5 *par. Ja.* 3. and 104 *Act. Par.* 7. *Ja.* 5. So are Protestations for remeed of Law: Or if the Session being a limited Judicatory, should proceed to decide in matters not falling under their Jurisdiction, As in matters of State and Government, or Crimes; or sustaine themselves Judges in the first instance in adjudications of Prizes, or Divorces. As likewayes, if the *Lords* should upon full debate decide, and thereafter upon the same grounds formerly represented *super iisdem deductis*, should retract that, and make a direct contrary *Decision*, whereby parties would alwayes be uncertaine of their Rights. For if they might once retract their *Decision* on the same grounds, they might doe it againe and againe for ever; and the great Inconveniency of this was discovered by our Predecessors many ages agoe, for eviting whereof by the foresaid 62 *Act* 14. *Par. Ja.* 2. All Causes were appointed to be utterly decided by the Lords of Session, but any remeed by appellation to King or Parliament, because if appeals were once allowed, it were impossible to bound the Parliament, or terminate any *Decision*; for the Parliament hath alwayes power to rescind any Law that could limite them, and make contrary *Decisions* on the same grounds as oft as they pleased, without any Imaginable remeed. In all these cases abovementioned, Complaints and Protestations are lawful, but still with the Caution and Limitation mentioned in our ancient Laws and Acts of Parliament. *viz, That if Murmurs, Complaints, or Protestations be interposed without Just and Legal Grounds authorized by the Law, the Presenters thereof are severely punishable*; which is most necessary for preserving the Honour and Respect of the *Supreme ordinary Iudicature*, which bears

As this is plain reason upon the one hand, so let the Consequence be considered on the other: For if such Protestations were allowed to be offered at the pleasure of any Party, they would necessarily come to proceed of course, and none who have the Disadvantage by the *Decision*, will fail to offer a Protestation, which doth not cost one Farthing of Charge; and whereby there may remain an hope and expectation, that one day, they may have that Sentence reversed; for few men can be so just and equal in their own Concerns, as to be easily convinced of the Justice of a *Decision*, which cuts off their Claim, or makes them lyable to great Burdens or Debts: And that after great loss of Labour, Time and Money; and of those that can be convinced, there are many who will not have the Ingenuity to forbear interposing any Protestation, that may support the Interest of their Cause, right or wrong.

3 Suppose then this Inevitable Consequence, that every decreet did containe in the Bosom of it, a protestation *for rescinding thereof by the King in Parliament;* with what assurance or quiet, could any man enjoy his fortune, which at any time had been called in question, or might become debatable in any time by past, or to come? How should any man know to regulate himself in the expence of his Living, the education or provision of his Children, or in the Management of any of his Affairs? For suppose the usual wayes of Inhibition, Arreistment, or other Diligence upon the grounds of any process had been used, and that the Judge ordinary had annulled all upon payment, or other ground of Law, yet the interposing Protestation would so fetter that party who was once under diligence, that to the end of the World, he could not dispose upon any part of his Estate heretable or moveable, that was at any time under Diligence; because, if that Sentence of the Lords, by which the diligence was found extinct, should come to be reduced, the diligence would revive. And all Acquirers for whatever cause, become lyable to restitution, and tho' it came never to be reversed, yet the possibility thereof would so

burdened, nor dispose of any part of his Estate for payment of his other Debts.

4. It is the aim and Intention of the Law of all Nations, *Ut aliquis tandem sit finis litium*: And therefore every Nation hath their several forms of *Proceſs*, to which every party muſt comply: And very often, it falls out in every Nation, that thoſe who have really and truly material Juſtice on their part, do juſtly ſuccumb in their Cauſe for neglect of theſe Forms; for whom the Law provides no remedy, but only gives them warning of their danger, and tells them, *Vigilantibus, non dormientibus, jura ſubveniunt;* Other Caſes again are ſo dubious, that upon full debate, the Judges and Learned Lawyers of every Nation, are divided in their Opinions; ſo that the *Deciſions* of moſt Important Cauſes are often carried but by one or two Votes, (tho' it was far otherwayes in this Caſe) Yet it is generally thought every where, more ſecure, to reſt in the *Deciſion* of the moſt doubtful Caſe, than to leave parties unſettled in their Rights and poſſeſſions: And oft-times it happens, that through the diſadvantage of Indiſtinct and unclear repreſentation of Caſes, the ſame Judge may determine otherwayes, then he would have done, if the Caſe had been fully and clearly repreſented: And frequently points are mentioned in Debates ſo overly, that they are neither noticed nor regarded by the oppoſite Advocats, nor the Lords at deciding; and yet being once mentioned, they would be competent in a Review, where being Illuſtrate, they might appear more important, than all that was debated, or under conſideration at the time of the *Deciſion*; and ſo might be a ground to annul what was done moſt juſtly upon the grounds urged, and under Conſideration, whereby the Juſtice and Integrity of the Lords might be tarniſhed by the Faults and Omiſſions of Parties or Procurators. And if by Proteſtations ſuch doubtful Caſes were brought in without limitation, to be debated before a different Judicatory proceeding by different forms, and in a diſtinct view and in another light; it were impoſſible for

Decision, to hundreds of Third parties, who had no Interest or concern the time of the first Sentence. Nor can any person foresee all that might follow upon such a sudden alteration, as to allow *unlimited Protestations* in any Case; only this much is plain, that the evident evil Consequences are so many, as would render every man uncertain in his enjoyments; not knowing at what time, some one of these Consequences might reach him, which would at one blow, strick at the root of all the quiet and secure Enjoyments and Possessions of the Liedges.

But to return from these more remote Considerations anent the import of *unlimited Protestations* in general, to the particular Case in hand, suppose that Protestations were in every Case allowed; yet it seems highly unreasonable, that the same should be admitted otherwise, than in terms of respect to the *Lords*, and in moderation; or that Parties should be admitted to affix such injurious and reflecting Characters upon their *Decisions*, as the Petition contains, as if any *Decision* of the Lords should be so grosly absurd, *As to violate the Faith of all Contracts, and to wrest Law to the ruine and defraud of Widows; and not only to encourage indirect Dealings, but to own the design of Law to be such, and to deliver a Decision that equally impugns Law, Equity and Honesty.* These expressions all contained in the Petition are so harsh and rude, that if they were allowed at a Parties pleasure, it would deprive the Lords of the benefit of that Credit, Respect, and Honour, which is due to them by many former Laws, several times reitetate in every Reign, since the Institution of the Colledge of Justice; and which were thought necessary in the former and present Ages, not so much for regard to the Persons of the Judges, as to the Interest and Security of the People, that these to whom the final determination of all civil Causes, in the ordinary Administration Justice was committed, might not be over-awed, by the Influence and Humour of any person what-

until upon legal Tryal, they were Convicted to have done *Wrong or Unhoneſty*, as the Law bears

And as this method is not allowable in any Caſe, ſo for clearing the Injury and Injuſtice thereof in this; the ſame is deſired either to be conſidered, as it is ſtated in the Proceſs above-mentioned: Or if any perſon be unwilling to beſtow ſo much labour, let it be conſidered in a more general view, what rational probability can ariſe from the Circumſtances of the Judges and Parties, that they ſhould be guilty of ſuch groſs Iniquity, in prejudice of the Lady *Caſtle-haven*? As the Petition proports.

Collingtoun had no near Intereſt, or contingency by Relation, or otherwayes, to any perſon on the Bench, or in the State; and that which in all former times has created Fears and Jealouſies of corruption and Iniquity, hath either been perſonal Intereſt with, or by the Party, or Court Influence: On the other hand, the Lady *Caſtle-haven* wanted not a Relation either upon the Bench, or in the State; and particularly ſhe is in that near degree of Conſanguinity with the ſole Secretary of State, now *His Majeſties High Commiſſioner*, that in Law ſhe is reckoned in the place of a *Parent* to him: And tho' that Noble perſon is indued with more Integrity, Honour & Juſtice, than in the leaſt to deſign, or countenance the over-awing of the *Bench*: Yet the Lords nether were, nor could be Ignorant, that her Intereſt was ſufficiently regarded, and that ſhe did not want a juſt Support and Countenance of her Friends and Relations; withall not above one or two of the Lords were Perſonally known to the King, or could be ſuppoſed to have their Advancement in Places, without the Influence of the *Secretary*; and it would appear, they had very early forgot their gratitude, if they could in ſo few Weeks after their Advancement, be guilty of ſuch groſs Iniquity to the near Relation of ſo eminent a Perſon, by whom they were ſo lately Obliged. And tho' they could have forgot their Gratitude, and alſo the *Oath of God* that lay upon them, and all without

they did so far neglect their Interest, as to Disoblige a person, whose Favour might be so useful, in supporting them, or promoving their farther Interest? Besides, were they Ignorant that there were many envious Beholders, to observe their Halting, especially in the beginning of their Administration: And what was to intice them to all this gross Iniquity? Let the World but consider, if the *Decision* had run on the other side, and that *Collingtoun* had Interposed a Protestation. What Influence might these general considerations have obtained in the minds of these who are only fit or willing to receive a general view? But the *Decision* in this case, did carry so little presumption of any byas or corruption, that it gave a general satisfaction; and nothing could have more reasonably vindicat the reputation of the Integrity and Justice of the *Lords* in the eyes of all indifferent Persons, it being thereby evident, they could not be influenced by any interest or by-end; And it is not questioned, but the great Persons who have Relation to the Lady will find it their Interest and Credit to support the Lords, in determining according to their Consciences, and that they will look upon it as a great Honour to them, That during their influence, The Judges of the Land were not overawed or afraid by the Interest of any party, to determine according to the Law and their Judgements, as it is recorded of one of the greatest of our Kings, that the Lords having in his own presence, Determined Against his interest, He rejoyced in the Integrity of his Judges, neglecting his loss.

And wheras the Petition asserts, that *the Ladies Lawyers did redargue all the quibbles of her opposites to the Conviction of all Lawyers, who were not blinded with personal Concern.* for proving this also, there is still the same Authority, *The Ladies assertion*, And that which she is pleased to call *Quibbles*, is a continued train of uniform *Decisions*, in the cases of clauses of *Conquesce* to Wives and Children, for the space of above sixty years. By all which, the Lords have followed one constant Rule, *That such Clauses do not hinder a Husband or Father to use a full*

during his Life, albeit these should wholly exhaust the Conquesce at his Death, As appears by the Abbreviat of *Decisions* above-mentioned, whereof many more of the like Import could have been produced. And it is strange, that all Lawyers not blinded with personal Concern, should be so much convinced of my Ladies Right, seing the Lords were so unanimous in a different Opinion, and that their personal Interest for *Collingtoun*, could not justly be suspected. And the Lady, in all the freedom she takes with them doth not brand them with Ignorance, that they did not understand her Case; nor doth she pretend, that it was not fully and maturely considered (the same being debated in *Presentiâ* three intire dayes; and after Informations, another day spent in Advising) only the Judges were *So prone to Iniquity, that surpassing the example of all others, they practised injustice for injustice sake, without the least bait or allurement to engage them to it.*

And lastly all the Iniquity that my Lady Complaines of, Is this, *That Collingtoun succeeded to his Fathers Estate, which was relieved by his purchass, during the* Marriage *whereof she Craves the Liferent.*

It were improper and tedious, to repeate the satisfying answers in this place, which are fully contained in the informations abovementioned. Only if the Ladie's own Petition be duely considered, it may furnish no small evidence, that this was no such Iniquity, as is contended. For, 1 The Petition bears That *the deceased Collingtoun offered a* Joynture *of 3000 merks yearly, which was all he had, but she did refuse to accept of that, because thereby the* Children *of the first Marriage would altogether want, and therefore she did only take a general clause of* Conquesce *in the termes foresaid.* Can any thing then be more cleare, than this acknowledgement, that it was the designe of Parties, that the Heirs of the Lord *Collingtoun* should succeed to his Estate of *Collingtoun*? And the very terms of the *Contract*, beside the present acknowledgment bears, that *the* Conquesce *during the* Marriage, *should belong to*

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failing to Collingtouns *other Heirs, who are to succeed to his other Estate.* So that still it was in prospect, that the Heirs of the first Marriage, should succeed to the Estate of *Collingtoun*, And that the Lady would not deale so with them as to prejudge them of that Succession, even during her life. This being once acknowledged, how can it be controverted that by the designe of the communing and contract, the Defunct was allowed to releive these Lands, that his Son might succeed? Seing it is imported and acknowledged by every step of the Ladies process, her Summonds, and all the Debate on either hand, That *Collingtouns debt at the time of his Marriage, did exceed the value of his whole Estate,* So that it was impossible that his Son could succeed to any part of the Estate, unless the debt were payed. And if the Lady had that Justice and Affection to the Children, as she expresses in her Petition, that she would not hinder them to succeed, wherein did this bounty consist? Unless the Defunct had been allowed to releive his Estate, Without which their succession thereto, (which the Lady herself designed) was utterly impossible; And if any farther evidence were needful, let this be considered, that the Lady takes the *Lifrent* of the House and Yeards by her Contract, which she doth possess, and she refuses a *Joynture* of 3000 *merks* out of that Estate in special, or by a general obligement, which would have been a Debt affecting the Defuncts Heirs; why was all this done, and a clause of Conquesce accepted in place thereof, if there had been any project for binding up the Defunct from releiving, his own Estate? Did ever any Lawyer lay a *clause of Conquesce* in whatsoever terms conceived, in the Ballance with a *special Obligement* to a Wife? The one being the *Most*, and the other the *Least* effectual of all obligements.

2 *Collingtoun* did not succeed to his Fathers small Estate, which the Ladie's Petition owns to be but 3000 *merks* yearly, nor was it releived by his Fathers means, but by his Ladies Portion, which was very considerable, and all that his Father could contribute for relief thereof, was not valuable; This

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Estate in *Anno* [illegible] At which time, his Father had only enjoyed his Sallary, as a Lord of the Session, and a part of his Ladies Joynture, for a few years, which was no Fond to Inrich and Inable him to pay any Considerable Debt, after deduction of the expences of the Family, and the Education of his Children, upon whom he bestowed liberally. And it will not be pretended that *Collingtoun* could be lyable for any deed of his Fathers, by misapplication of Conquesce or otherwise, after he was provided and secured to the Estate by his contract of Marriage. And if the Defuncts *Conquesce* were but generally known, there would not be ground to make so great a strugle about the *Liferent* of it. But the true rise of the Difficulty is in this, that *Collingtoun* never heard or understood any thing of the Ladies claime, during his Fathers Life, and thereby was not upon his Guard to provide against it, or to keep his proper acquisition by his Lady, separate from his Fathers Interest; but having lived in a perfect and intire Confidence and friendship with his Father, and suffered his Ladie's portion to be applyed, for the payment of his Fathers Debt at his pleasure, without taking assignation to one shilling of what was payed, yea without so much as mentioning, from whom the Money was received, the difficulty of clearing what was payed by his *own Money*, makes him the more concerned to *Defend*, and the Lady more earnest to *pursue*, she hoping by the process, to have reached not only the Liferent of her *Husbands Conquest*, but likewayes of this *Collingtouns Portion* with his Lady, which is far from the Kindness, and Just Inclinations, expresst in the Ladie's Petition, to have been communed at the Contract of Marriage, in favours of the Defuncts Heirs and Children.

FINIS